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POLITICS AS JURISDICTION

A New Understanding of Public and Private in Political Theory

Gerard Drosterij

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Politics as Jurisdiction

A New Understanding of Public and Private in Political Theory

Proefschrift

ter verkrijging van de graad van doctor
aan de Universiteit van Tilburg,
op gezag van de rector magnificus,
prof. dr. F.A. van der Duyn Schouten,
in het openbaar te verdedigen
ten overstaan van een door
het college voor promoties aangewezen commissie
in de aula van de Universiteit
op 25 juni 2008 om 14:15 uur

door

Gerard Drosterij
geboren op 1 juli 1972 te Amsterdam

PREFACE

During the 1990s it was my student experience of the absolute boredom of Dutch politics that triggered a desire to deepen my understanding of political philosophy. The spectacle of politics as a prestigious playground of experimentation for increasingly younger politicians with a candid aversion to political ideology but an undying appetite for institutional change—it was a challenging sight. Today it is still embarrassing to observe politicians who are incapable of distancing themselves from daily politics. Apparently, they need to retire first, start to hang out with pop stars, and visit charity events before they can begin solemnly contemplating wisdom and reflecting on that “crazy short-term circus of politics” they were once part of. I wish for politicians with the talent to transcend journalistic observations, while showing a cautious attitude in the execution of their mandated power; people capable of providing a stable legal mainframe, while not being seduced and swayed by the grotesque and sometimes sad media events in our daily life. Political questions are complex and need plenty of experience and thought. It is not enough to master the manipulative art of media communication, believing that to show strong will power is the practical quintessence of democratic accountability.

This work took me considerable time to finish, yet I find solace in the words of Aristotle that “a young man is not equipped to be a student of politics.” With a project like this, many people are involved—despite the fact that writing is a solitary business. I am grateful to Samira Benlaloua (for use of laptop), Coert Noordermeer (for use of laptop), Koos Levy-van Halm (for study accomodation), Ineke Sijtsma (for editing), Paul and Pia Coenjaarts (for study accommodation—and the finest baked potatoes), Felix Janssens (for use of printer), Ailsa Montagu (for editing), Gerrie and Hein Meijers (for study accommodation), and Contemporary Political Theory (for kind permission for reprinting parts of Chapter 3).

I especially thank Shulamit Kleinerman for master editing the complete manuscript; I am glad we met at the last moment as the result is so thoughtful and perceptive.

Thank you to Joyce and Erik for being dear to me, Charly for our special friendship, and thanks to all my other friends for putting up with an academic. Thanks to Hein, who designed the book and who I consider my great moral motivator. I am proud to have him on my side.

I thank Jeroen van den Hoven, for inspiration and for the trust with which he invited me to start writing this book—although the result is not as initially intended. Many thanks to Wibren van der Burg for carefully and critically reading the manuscript and, most of all, for being the best of help in difficult times. He has shown patience and conviction throughout the latter part of this research. Extra thanks to Jerry Gaus, for whose generous willingness to comment on my writings and to take part in the dissertation committee I am very grateful.

A special word to Liesbeth Huppel. While I was writing this thesis, our discussions have not only been the highest of philosophical pleasures, but they have also been vital for getting the story as it is. Her help has been precious. Without experiencing Liesbeth's gripping lectures on law and philosophy in that summer of 1995—while smoking Belgas in the classroom with co-tutor Niels—I certainly would not have come so far as finishing a doctoral dissertation. It's crazy.

I am very grateful to my parents for supporting me in so many ways, and most off all, for being such loving people to me.

Finally, I send my love to my own family. During these years I have met Lies, my dearest. We have been blessed with Jacob and Rosa, our daily delights. The greatest support while writing this book has been from Lies—she is my true believer. Without a doubt it is her book as well.

GERARD DROSTERIJ

Rotterdam, May 6 2008

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INTRODUCTION

Since the 1990s, many political scholars have argued that the opposition between liberalism and republicanism has been successfully challenged by deliberative democracy.¹ Scholars of deliberative democracy take the political system to be an association governed by the deliberation of its members.² They aim to rejuvenate the idea of democracy as popular self-government, maintaining that political decisions should be (as much as possible) the result of public deliberation and discussion. As John Rawls puts it: “The definitive idea for deliberative democracy is the idea of deliberation itself.”³

The “deliberative turn”⁴ in political theory is seen as a landmark attempt to break through a familiar dilemma in political theory: whether to give priority to the rule of law, as emphasized by liberalism, or to popular sovereignty, as emphasized by republicanism. Jürgen Habermas, who has provided deliberative democracy with much of its philosophical foundation, explains the model’s popularity: It “invests the democratic process with normative connotations which are stronger than those found in the liberal model but weaker than those found in the republican model.”⁵ Deliberativists thus reject a purely legalist conception of politics, but hold on to the liberal priority of the right over the good. Likewise, although they oppose republicanism’s perfectionism and paternalism, they maintain its emphasis on citizenship.⁶ Liberalism and republicanism should be seen as friends, then, not foes. Political justice is the ultimate political goal, but one which can be fairly established only through public *and* reasonable deliberation: “the struggle to make something public is a struggle for justice,” Seyla Benhabib writes.⁷

Deliberative democrats are critical, however, about the current state of public discussion. They fear that private interests are dominating the political debate and that people increasingly act as consumers. Benjamin Barber remarks: “Public citizens must be restored to their proper place as masters of their private choices.”⁸ Political decisions differ from market decisions because they are made after public deliberation. Market decisions, in contrast, are made merely with a view to optimally aggregate certain particular interests.⁹ Barber’s fear is a weak democracy, his challenge to empower democracy through participation and discussion. We need what he calls a *strong democracy*: “a political community capable of transforming dependent private individuals into free citizens and partial and private interests into public goods.”¹⁰ Cass Sunstein agrees resoundingly with Barber: “To work well, a deliberative democracy had better have many such people. It cannot function without them. And if many people are able to benefit from wider exposure, it is worthwhile to think about ways to improve the communications market to their, and our, advantage.”¹¹

“Improving the communications market” is the answer not only to materialist

consumerism but to other social issues as well.¹² With the growing influences of non-Western and popular cultures, scholars of deliberative democracy stress the importance of publicly discussing moral conflicts and differences of cultural meaning. As Dutch writer Paul Scheffer puts it: “Without a ‘we’ society will not hold, without critical concern society will be fragmented.”¹³ The point is this: we have chosen an open society and we cherish a pluralism of values, yet such a political system will hold together only by means of a critical and collective process of self-examination. The challenge of cultural pluralism should be met, according to Amy Gutmann and Dennis Thompson, by securing “a central place for moral discussion in political life.”¹⁴ Public deliberation makes politics more inclusive, more democratic; it gives people a chance to discuss and decide on issues that affect them all. This implies, though, that *before* preferences can be accepted as democratically legitimate, they need to be exposed to public scrutiny.

On the face of it, I might be inclined to subscribe to the deliberative intuition; after all, what could possibly be wrong with discussion in a democracy? How can anyone committed to the common good seriously disagree with it? Why oppose the notion that politics rests on the participation of citizens, and that moral dissent should emerge in civic discussion? Indeed, it could be argued that to live in a democracy implies that I may *expect* that my fellow citizens will put the general interest before their own and that they will provide well-thought-out explanations and justifications for their preferences. To act selfishly, in political terms, would amount to downright oppression.

On further reflection, however, I find doubts cropping up. Politics as public deliberation: is that truly the essence of living in a democracy? Does closing the alleged gap between citizen and politician with more debate really increase democratic legitimacy? Should politics be measured by the quality of civic discussion? If I consider more carefully, what do I personally value most about living in a democracy—having public discussions about political matters, or experiencing private happiness that is safeguarded by a trustworthy government? What do I think is important in politics—exerting as much influence in political decision-making as possible, or putting trust in officials who adequately represent my sovereignty?

Although portraying the choice like this seems rather black and white, if not academic, ultimately it makes sense, I think. It points at a persistent double issue in our times: the politicization of public debates and the popularization of politics. Daily politics often looks like a media event, a pitch of popular ideas, while many public discussions tend to gain immediate political importance, evoking state action. Both these phenomena are the effect of the deliberative approach to deal with what is sometimes called the “democratic deficit”: the growing political influence of private preferences, on the one hand, and the growing gap between public discussion and political decision-making, on the other. Deliberative democrats see the democratic deficit as detrimental to political legitimacy, arguing that if individual citizens are

increasingly unqualified (or unwilling) to assess their thoughts, and if politicians are increasingly unwilling (or unqualified) to sympathize with needs of the public, the democratic system will not survive. These thinkers suggest that public discussion will remedy the democratic deficit—that individuals will improve their preferences and become better citizens by using their public reason, while state officials will learn to be more democratically accountable by getting in touch with their citizenry. The idea of public discussion has become the all-around fix for the democratic deficit, a proxy for democratic legitimacy.

The time has come to question whether publicly scrutinizing private preferences is really a means to raise the democratic legitimacy of politics. Instead of further *integrating* public discussions and politics, perhaps it makes more sense to *distinguish* between them again. On the one hand, we need to put more trust in the way people operate in their surroundings, how they use those experiences as a way to preserve a democratic way of life. On the other hand, we need to rethink the other aspect of democracy, how public authority should govern civil society. Surely, the idea of democracy is that the public decides on how things should be done politically, but in practice the public's efforts to raise the quality of life take place in local settings and usually have an effect on only small groups of people. As banal as this might sound—or perhaps, to some, dangerous—it is this *civil* environment that politics ought most urgently to preserve and protect. In addition, it is important to bear in mind that what you and I might generally think to be important and precious is very hard to translate into political terms. Just as I cherish my health and expect to have a say about how to care for my body, I want to trust—and be able to expect—the physician to do what is right, in the end. I simply do not have the bigger picture in front of me. I am happy, often eager, to publicly discuss things I deem important with my fellow citizens, but I know at the same time that the political perspective about these things is complex, not something that can be easily dealt with, let alone justified, by a framework of public deliberation. To think politically about these things is to reflect on how to legally organize and govern the institutional interrelationship of these subjects about which we think and deliberate. The inverse applies to politicians: although—like any citizen—they will have ideas about the moral value and quality of things, putting those ideas directly into a prescriptive policy is not appropriate. In sum, political discussions are not simply public discussions about what is morally valuable, and conversely, moral discussions are not simply political discussions about how things should be done and managed.

This book takes up the deliberative intuition and critically examines its origins. The legitimate question is whether the justification of the political system should be so closely connected with the public discussion and validation of preferences and values. I will argue that the plea for public discussion in politics is not unique to deliberative democracy but is the symptom of a longstanding tendency

in political theory. It is the effect of a political paradigm that I call *politics as will formation*. According to this paradigm, politics evolves around the issue of how to deal in a democratic way with people's opinions, interests and preferences.¹⁵ The conception of politics as will formation centers on the communicative dynamics, which originated in the Enlightenment, between private (or strategic) and public (or reasonable) preferences. In that era, the idea of political governance based on the idea of subjective autonomy arose. The "we question" was introduced in politics—that is, how society was to be managed by the public. The answer was thought to rest in the preparedness and capability of each citizen to rationally relate his or her motives of self-interest to the bigger picture of the polity. The expectation was that out of the public use of the citizens' reason, a political collectivity would develop.¹⁶ The central question, according to politics as will formation, is how the will of the citizen can be transformed into a politically legitimate will.

I propose an alternative conception to politics as will formation, which I call *politics as jurisdiction*. This conception is based not on the public/private distinction between selfish and selfless preferences, but between state authority and civil autonomy. Politics as jurisdiction does not connect political authority with processes of will formation—it strictly distinguishes between them. It is concerned with achieving the right balance between, on the one hand, the desirability of an autonomous realm of civil practices and, on the other, the inevitability of the interventional authority of the state. Politics is not the result but the condition of processes of will formation; its legitimacy lies not in the quality of will formation but in the representative framework of public authority through which civil practices of will formation are put into a political whole. Politics as jurisdiction is about finding the right relationship between the representative power of public authority and the relative self-sufficiency of civil society—an intricate and tactful task which no one has described more eloquently than Jean-Jacques Rousseau: "How to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others, obeys no one but himself, and remains as free as before."¹⁷

To some, politics as jurisdiction might be reminiscent of the familiar—Rawlsian—distinction between private good and public justice, but, in fact, it is quite different from it. The distinction between civil society and political authority is not preferentially defined, it does not run parallel to the distinction between the pluralism of private values and the unity of a public conception of justice. Politics as jurisdiction is not geared towards a system of public reason that is shared by all citizens, denoting the polity's constitution, as it were. As I will explain, sharing reason politically is something much more complex and harder to put in words.

The political jurisdiction of civil society requires an understanding of society's workings, its processes of meaning-giving and will formation. The political question, therefore, is not how to distinguish between public and private

values but how to balance the execution of political power in relation to the task of understanding and organizing processes of will formation. Politics in the end is based on the awareness of how people produce meaning and knowledge and how to legally organize the institutions *in which* people try to make the best out of their lives by forming their beliefs, preferences and desires.

The structure of the book is as follows. In Part One, I explain the insufficiencies of politics as will formation and argue for the importance of politics as jurisdiction from different perspectives: historical, analytical, and epistemological. In Part Two, I continue to develop and illustrate the argument of Part One by way, unavoidably, of a distinctive political-theoretical history of the “public” and “private.” My intention is first to demonstrate the different roots of both politics as jurisdiction and politics as will formation and then to present a collection of ideas that form the building blocks of politics as jurisdiction. For this political-historical approach, I have explicitly chosen to show a broader historical foundation of politics as jurisdiction. Inevitably, as a doctoral thesis, my study leaves much for future research. Two ambitions in particular will need to be developed in a more detailed way: first, politics as jurisdiction could more finely be compared against different strands of contemporary political theory, and second, current (global) politics should be analyzed more closely in relation of politics as jurisdiction.

In Chapter 1, I explore the moral idea behind politics as will formation, called the “publicity imperative.” Under this theoretical imperative, the expectation is that people will improve their private preferences by publicly discussing them. I argue that the publicity imperative hampers an adequate perspective on political issues, and I introduce three topics to exemplify this: the debate about the democratic potential of the Internet, Richard Rorty’s ironist critique on liberalism, and the question on the relation between freedom of religion and freedom of speech. I argue that in all these debates the political problem at hand is viewed as an issue of political will formation. My conclusion is that a moral perspective is too narrow for an adequate political theory. A more complex conception of politics is called for; and this means a fresh investigation into the conceptual merit of the public/private distinction.

In Chapter 2, I argue for the importance of the public/private distinction in political theory. The distinction may clarify some basic ideas that inform political theory, such as the publicity imperative. It could be said that political theory is affected by metaphysical impressions of the world, which should be made explicit during analysis. The public/private distinction is worthwhile in this respect, because it is a conceptual bridge between intuition and theory. I further examine the link between metaphysics and the conceptual constructiveness of the public/private distinction by reviewing Raymond Geuss’s *Public Goods, Private Goods* (2001). Contrary to his own rejection of metaphysics, I believe Geuss’s book nicely shows how metaphysics feeds his political approach; it provides the reader with an inside

view of a political philosopher's position in the world and explains how a theoretical stance proceeds from a personal intuition about the world.

In Chapter 3, I provide a critique of politics as will formation and introduce my alternative conception of politics as jurisdiction. At the basis of politics as jurisdiction lies the public/private distinction between "society" and "state." To bring this claim into perspective, I analyze Jon Elster's classic defense of deliberative democracy. Elster understands political theories in light of two sets of characteristics: he asks first whether the political process is *private* or *public* and then whether the political purpose is *instrumental* or *intrinsic*. The combined results of these two questions result in three views of political theory (liberal, deliberative, and republican), of which only the latter two make sense to Elster. Both entertain a "forum approach" to politics, claiming the essence of the politics to be public deliberation of private preferences. In my discussion, I ask why Elster did not analyze the fourth model, in which the political process is private and the political purpose intrinsic. I explain his omission by referring to his underlying paradigm of politics as will formation. An alternative approach, politics as jurisdiction, strongly improves the plausibility of the missing fourth model of will formation (which I call "civil democracy"), as it strictly distinguishes between the political and civil aspect of democracy. Politics understood as "jurisdiction" is concerned with acquiring and holding the balance between the implementation of public authority and the preservation of the institutional autonomy of civil practices of will formation. Political jurisdiction is the practical effect of the idea of popular sovereignty: in order to be free, people hand over their sovereignty to a public authority that ought to take care of their civil liberty. This surrender breeds, to a certain extent, public alienation, and in this regard, the legitimacy of public authority (the state) cannot be directly tied to democratic will formation, because it would undermine the political contract. The public discussion about political legitimacy should be concerned with the way the state legally preserves and intervenes in the institutional freedom of civil practices of will formation.

Chapter 4, the final chapter in the first section of the book, is an epistemological analysis of political theory. I scrutinize three postulates of political theory, that are heavily influenced by pragmatist epistemology and often recur in contemporary literature. The first postulate is that political theory is practical, not metaphysical, because it needs to bring solutions to social problems. The second is that political theory is social-constructivist, because, like all theory, it constructs reality. The last is that political theory is intersubjective, because its conclusions need to be justified to those whom it concerns, i.e., the people. I critically analyze the three postulates in the light of what I consider to be a key epistemological issue: the essential difference between experiencing and describing the world. This "epistemic problem" leads to a classification of three orders of social construction of knowledge: non-rational (zero order), tacit (first order) and rational (second order). Pragmatist epistemology does not strictly distinguish between these orders of construction, a lack that has

influenced contemporary political theory a great deal. Pragmatic communication evolves around tacit knowledge, from which perspective rational knowledge only gives technical guidance to communication, while non-rational knowledge has no meaning in communication until put in words. In Chapter 3, I argued that deliberative democracy is flawed precisely because politics is studied as a public process of rational will formation. In Chapter 4, I explain the pragmatist epistemology behind deliberative democracy: it understands political theory as a normative theory which deals with people's beliefs. These beliefs are understood as first order social constructions—provisional and continuously under public construction. The other aspects of communication, non-rational and rational, however, are, in their own right, imperative for any political theory, as well. Revisiting the three postulates, I first argue for political theory as a *third-order* construction. Political theory reconstructs second-order rationalizations (institutions, rules, protocols, regulations) of first-order and zero-order knowledge in the light of the need to put them into a legal whole. Second, I argue that political theory is not just “practical” but also “metaphysical,” because it needs to incorporate the non-rational aspect of knowledge as well. I conclude by claiming that, although political theory can be said to be intersubjective, it is not intersubjective in a rational sense but in a symbolical sense.

In Chapters 5 and 6, I develop the model of “civil democracy” by examining the public and private in Greek political theory. My complementary intention is to present an account of the Greek—meaning especially the Athenian—political tradition that is more balanced than a modernist account, which is heavily influenced by liberalism. Greek political theory is depicted as precisely the opposite of the modern liberal tradition. I argued previously that in the light of the great influence of the publicity imperative, a liberal picture of modern democracy is quite misleading. On the other side of the modern idea of freedom lies a critical awareness of private preferences. Greek political theory, in this respect, could be characterized as *more* liberal than the modern tradition, because, as I will argue, the distinction between will formation and jurisdiction is more strictly drawn. It is a modernist misunderstanding to depict Greek political theory so republically, while emphasizing the liberal strands in modern political theory.

In Chapter 6, I concentrate on Plato's and Aristotle's conceptions of “public” and “private.” Plato generally interprets the public/private distinction as a distinction between politics and knowledge, and he elaborates it twofold: as a relation between individual and political ethics, on the one hand, and as the private pursuit of justice and truth within a public framework of law, on the other. Aristotle expands the double Platonic private/public distinction by asking what knowledge we can actually *share*, and how we can *manage* that knowledge. Aristotle considers both questions essential political issues, because a political regime can be constituted only if it is clear what knowledge is shareable, how, and to what degree. The political question

of sharing and managing knowledge is based on distinguishing between three types of rational knowledge (technical, practical and theoretical) and two values of civil self sufficiency (institutional plurality and human pluriformity). Aristotle argues that the object of politics is to find a mean according to which citizens can develop themselves in the best way—which implies respecting the inherent limit of political unification: sharing knowledge itself is inherently limited, but so is politically managing society. With Aristotle’s development of Plato’s position, we arrive at an important argument concerning the dual task of politics as jurisdiction, which is to understand both the epistemological status of processes of will formation and the task of political management. Political theory, in Aristotle’s words, is of a “controlling kind.” In our words, it is a third-order construction: it studies the authoritative organization of democratically institutionalized knowledge.

In Chapter 7, I set out three modern conceptions of the public/private distinction. The idea of democracy can be explained as comprising three subjective senses of “publicness”: depicted, first, by the existential public/private distinction, which concerns the relation between the subject and existence (the world); second, by the moral distinction, which concerns the subject’s relation with other men (society); and thirdly, by the political distinction, which concerns the relation between the subject and authority (the state). A comparison between Rousseau and Kant will bring into perspective the two philosophers’ different approaches to these distinctions. Rousseau explains very well the differences between the three aspects of modern publicness, while Kant is focused on moral publicness, which he sees as the core of modern politics. Kant’s theory is the classic apology of politics as will formation. By means of the public use of reason, he explains, man is in contact with his fellow beings, able to think about what it takes to politically constitute society. Rousseau’s political philosophy seems similar but is in fact very different, because he fears that the moral dynamics of reason will undermine the political commitment by making the legitimacy of public authority dependent on will formation. Next to moderating moral publicness, Rousseau is concerned with safeguarding the subject’s existential sentimentality, which leads him to advocate the importance of politics as jurisdiction.

In Chapter 8, I explain, by introducing the political writings of Marx, Mill, and Dewey, how Rousseau’s fears have become real; that is, how the domination of the moral public/private distinction has led to a political discourse in which both existential and political publicness have disappeared. Put differently, the political subject is being characterized by his moral publicness: his ability to publicly transform his private inclinations is the source of state legitimacy. This has led to what I call the double bind of the public sphere: the public sphere is seen as a place where both moral preferences are constructed and political legitimacy is created. The erroneous effect is a political understanding of public discussions and a moral understanding of political discussions.

In the Conclusion, I return to the main theoretical aspects of the study, and put them into perspective by sketching the relation between politics as jurisdiction and a particular civil practice, using a religious school as an example.

(Notes)

¹ A few passages of this introduction follow G. Drosterij (2007) “Mind the Gap: Three Models of Democracy, One Missing; Two Political Paradigms, One Dwindling.”

² E.g. J.L. Cohen (1988) “Discourse Ethics and Civil Society,” pp. 12-24. J. Cohen (1997) “Deliberation and Democratic Legitimacy,” p. 67; A. Gutmann and D. Thompson (1996) *Democracy and Disagreement*, p. 12.

³ J. Rawls ([1997], 2001) “The Idea of Public Reason Revisited,” p. 138. Henceforth: “Idea of Public Reason Revisited.”

⁴ J. Dryzek (2000) *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. v; cf. B. Ackerman and J.S. Fishkin (2003) “Deliberation Day.”

⁵ J. Habermas ([1996], 2001) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, p. 298. Henceforth: *Facts and Norms*.

⁶ “[Deliberative democracy is not] simply a theory of democratic participation that does not respect the legal boundaries of individual liberty.” S. Benhabib (1996) “Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas,” p. 98, n. 32. Henceforth: “Models of Public Space.”

⁷ Benhabib, “Models of Public Space,” p. 83. See also W. Kymlicka (2002) *Contemporary Political Philosophy*, 2nd edition, p. 153.

⁸ B. Barber (2007) “Overselling Capitalism.” “[T]he private relates to public as childish stands to the adult. Prioritizing the individual and rendering community private in a way that makes it look like an aggregation of private individual wants and needs is a puerile way to understand and explain the social world.” Barber cited in: T. Jollimore (2007) “Hey, kids! Madison Avenue wants you!”

⁹ See also e.g. J. Bohman and W. Rehg (1997) “Introduction,” p. xiv. “The deliberative process forces citizens to justify their decisions and opinions by appealing to common interests or by arguing in terms of reasons that ‘all could accept’ in public debate.” J. Bohman cited in: T. Witschge (2004) “Online deliberation: Possibilities of the Internet for deliberative democracy,” p. 111.

¹⁰ B. Barber (1985) *Strong Democracy: Participatory Politics for a New Age*, p. 151.

¹¹ C. Sunstein (2001) *Republic.com*, p. 169.

¹² The deliberative line of thought can be applied, for instance, to the ecological issue. People need to become more conscious of what they do and what general effects their actions have. Al Gore argues, “we can no longer afford to view global warming as a political issue—rather, it is the biggest moral challenges facing our global civilization.” See: <http://www.climatecrisis.net/aboutthefilm>.

¹³ P. Scheffer (2007) *Het land van aankomst*, p. 405, my translation.

¹⁴ Gutmann and Thompson, *Democracy and Disagreement*, p. 1.

¹⁵ Cf. I. Shapiro (2003) *The State of Democratic Theory*, pp. 1-9, and p. 146.

¹⁶ Cf. J. Rawls ([1993], 1996) *Political Liberalism*, pp. 7-9.

¹⁷ J.-J. Rousseau ([1762], 1968) *The Social Contract or Principles of Political Right*, p. 60. Henceforth: *Social Contract*.

PART ONE

THE ARGUMENT

CHAPTER 1

The Publicity Imperative: The Moralization of Politics

1.1 Introduction

Below I sketch my approach to political theory. More specifically, I explain what I consider to be the main idea in political theory today: the publicity imperative (section 1.2). I will illustrate some problematic implications of the publicity imperative by elucidating the high expectations that some political/legal scholars ascribe to the democratic potential of the Internet (section 1.3). The next section (1.4) introduces the main analytical viewpoint of this book: the distinction between public and private. That section shows how a certain interpretation of the public/private distinction clarifies the dominance of the publicity imperative in political theory, and how this dominance obstructs a view of politics that is more layered.

1.2 What is the problem? The publicity imperative

My fascination with political philosophy took shape after reading Jürgen Habermas's *The Structural Transformation of the Public Sphere*, Max Weber's *The Protestant Ethic*, and Immanuel Kant's "What is Orientation in Thinking?"¹⁸ All these works, although written in different times and from different perspectives, have as their subject a very typical characteristic of modernity. They deal with what I will call the *publicity imperative*—that is, the expectation that people improve their opinions and preferences by publicly discussing them, with the purpose of raising the democratic legitimacy of politics. The publicity imperative originated during the Enlightenment: it is an invitation to free oneself from subjection and to start thinking for oneself. The publicity imperative, however, is not just an appeal to emancipation, but to *critical* emancipation: it expects the subject to try his inclinations, and thoughts about them, in front of others to become a better person. The publicity imperative is a model for growing up in public. The moral claim it makes on the subject is also a social claim: since the carrier of private enlightenment is reason, it needs to be applied in public.

The conceptual development of the publicity imperative can be sketched by the different approaches of the three starring authors. Weber situates the spiritual origins of the publicity imperative in the Reformation. He describes how people increasingly became aware of a deep sense of metaphysical uncertainty caused by the proclamation of God's transcendence. People were confronted with a process of spiritual privatization, which evoked a drive to work and speak from their faith in God.¹⁹ "The only way of living acceptably to God was not to surpass worldly morality in monastic asceticism, but solely through the fulfillment of the obligations imposed upon the individual by his position in the world. That was his

calling.”²⁰ The Protestant relation between private conscience and public works was all but harmonious, to be sure. God’s Will was thought to be absolute, man’s fate predestined, against which no action could have any influence.²¹ As it was rather crudely put by the Westminster Synod of 1647: “By the decree of God, for the manifestation of His glory, some men and angels are predestined unto everlasting life, and others foreordained to everlasting death....”²²

This irreconcilable conflict between the subject’s grace and his worldly actions changed during the Enlightenment, when the publicity imperative became harmonized through the universal idea of public reason. Bringing reason into play implied that the moral value of a belief was defined by the very condition *of its being made public*. Instead of relying on individual faith, the moral status of a belief depended on public reasoning. The subject was expected to master the practical virtue of moral truth-finding by discussing his beliefs. Alasdair McIntyre’s remark, in this regard, is worth recalling: “We are so accustomed to classifying judgments, arguments and deeds in terms of morality that we forget how relatively new the notion was in the culture of the Enlightenment.”²³

According to Kant, the public use of reason emerges from individual immaturity. The implication of the imperative is to have the courage to use one’s reason as a necessary compensation for one’s metaphysical uncertainty.²⁴ Since destiny will never be known to us, we have a responsibility to think about the spring of our life existence through the idea of reason, which God has given to us. “The *concept* of God and even the conviction of his *existence* is to be found only in reason as its exclusive source....”²⁵ Pure faith lives in reason, Kant says, which means to think beyond empirical sensations and “objective grounds of knowledge.”²⁶ Even all efficacy and beauty of nature will not satisfy us as humans, and this rational dissatisfaction drives us to orient ourselves in thinking itself.²⁷ Reason is where our morality, and hence our humanity, resides, according to Kant: in the subjective use of public reason. The publicity imperative is directed towards the subject and carries an inherent democratic anticipation: humans are essentially moral beings, and morality consists in considering oneself as freely subjected to public reason. With Kant, the early Protestant metaphysics of uncertainty results in a morality of publicity.

Habermas has described the *political* implications of the concept of the publicity imperative. During the eighteenth century, a public sphere emerged in which a critical-rational debate took shape between people using their faculty of reason. The public sphere became a discursive challenge to state authority. The public sphere in the sixteenth and early seventeenth century was however still dominated by what Habermas calls a “representative publicness.” The ruler’s authority was based on a ritualistic display of status attributes; it was made visible to the public yet exempt from democratic scrutiny.²⁸ The modern public sphere, on the other hand, was based on the notion of public discussion as “the abstract

counterpart of public authority;²⁹ it became the place where private opinions were expected to become an object of public reason, so that they could become part of the political discussion. The idea of publicity became the very touchstone of state legitimacy: the validity of a political opinion depended on its confrontation with the public.

When comparing the analyses of Weber, Kant, and Habermas from a historical perspective, we see that the effect of the publicity imperative expands. We first can trace a gradual shift, from the step into publicity made by individuals as the effect of spiritual loneliness, to a step into publicity caused by the universal appeal of reason. Habermas's historic conception of the publicity imperative, finally, is political. It integrates both the protestant and moral notions, becoming an *individual imperative to discuss political matters publicly*.

The idea that preferences need to be confronted in public is still seen as fundamentally important in contemporary political philosophy. Many authors have revitalized the publicity imperative in the last decades, stressing the Enlightenment's cultural legacy.³⁰ The public use of reason is often deemed the moral nucleus of politics and appears, for instance, in the metaphorical opposition between "the market and the forum."³¹ The political ideal is the forum, which holds that preferences are to be discussed by the public, while its antonym is the notion of the market, which symbolizes the domination of preferences by commercial interests and private needs.

I have reservations concerning a moralistic conceptualization of politics, however. An understanding of politics as a search for publicity—a process in which only arguments in line with public reason are to be part of the political debate—is deeply problematic. Today, such issues as the status of interculturality, the dire state of the environment, or the influence of global capitalism are often portrayed as problems in the individual's formation of a political will; whether he is willing to put the general interest before his own interest. The dark side of politics is the democratic deficit, the lack of public will in politics.³² Underneath lies the fear that, if no common ground can be found, democracy is weakened. Public particularism is seen as a moral problem: the issue is whether citizens will be capable of thinking beyond their short-term interest.

The suggested solution for the democratic deficit is to close the gap between private and public preferences through greater efforts at public deliberation. An illustration of this escape route can be found in recent literature about the Internet and democracy. Although many commentators see the Internet's great potential for renovating democracy, they are also worried by actual developments that hamper this ideal. They seek to tackle this dilemma by pleading for a more democratic culture among Internet users themselves, thus preparing people online for democracy in real life.

1.3 Sketching the problem: Democracy and the Internet

The last decade has shown a great revival of democratic theory, not in the least due to the promising claims made on behalf of the Internet.³³ Because many feel the Internet to be the answer to the democratic deficit, there have been numerous inquiries into what kind of public sphere the Internet is—or, rather, should be.³⁴ These scholars believe that the ideal of citizenship can be enhanced if citizens are furnished with the tools—both digital and critical—to check and call into question governmental imperatives, commercialized market relations, and cultural claims. As Lincoln Dahlberg puts it: “The public sphere will not be extended merely through the diffusion of new technological artefacts. People must be drawn into rational-critical discourse before new technologies can be successfully employed....”³⁵

The theory of deliberative democracy is a popular conceptualization of this expectation. Assuming the political system to be an association governed by public deliberations, the Internet might improve the communicative conditions of politics and, therefore, raise its democratic legitimacy. The Internet is the electronic messiah of deliberative democracy. It embodies the promise of rational communication: by embedding the procedural principles of deliberation within its very technology, the quality of democracy may increase.³⁶

In order to realize this deliberative ideal, parts of the Internet need to be a public sphere—that is, a “noncommercial space where the interests of the public are articulated and vocalized in a sustained and deliberative matter.”³⁷ The political object is to safeguard areas of the Internet from intrusion by commercial and strategic interests. Parts of the Internet need to be made *safe havens*. Located between the Scylla of money and the Charybdis of power, these protected spaces should provide for optimal communicative conditions. Habermas’s concept of communicative rationality is the perfect conceptual tool to delineate the exact conditions of safe havens on the Internet; it provides accommodating criteria to critically evaluate everyday computer-mediated communicative practices.³⁸ The specification of the ideal of public deliberation generates communicative standards for the interpretation, and eventually transformation, of will-formation processes on the Internet. The very quality of digital preference formation is judged according to the democratic criteria of deliberation.³⁹

The publicity imperative has received much momentum with the rise of the Internet. The Internet’s deliberative potential demonstrates the way politics should be: a public web of multiple discursive and communicative designs. Larry Lessig explains the idea of the publicity imperative as follows: “The point is not the substance of the choice. The point is about politics as process. Politics is the process by which we *reason* about how things ought to be.”⁴⁰ And the Internet is just the thing in this respect, thinks Lessig: “Cyberspace might make this process where reasons count more possible; it certainly makes it even more necessary. It is possible to imagine using the architecture of the space to design deliberative

forums....”⁴¹

Like Lessig, Anthony Wilhelm⁴² and Cass Sunstein⁴³ also emphasize the need for democratic renovation, and the regenerative potential of the Internet in this respect.⁴⁴ Yet, at the same time, they point out the existing dangers of online alienation and fragmentation. In fact, although they believe the Internet to offer a great democratic promise, they are disappointed with the way people are actually behaving on it. Sunstein gives an account of the “Daily Me,” a Cyclopic consumer who chooses a path on the Internet that is completely in line with his or her preferred lifestyle and values, missing (or avoiding) other ways of living that might challenge the views this consumer already holds. The Internet serves more as a playground for consuming goods than as an open forum in which people strive to develop their intersubjective reasoning. According to Wilhelm, people “are interested mainly in vocalizing their individual or private interests and care little for adapting the position of another through persuasion, negotiation, and compromise.”⁴⁵ Lessig’s, Sunstein’s and Wilhelm’s moral teaching is what John Dewey calls the *problem of the public*: “the essential need [to improve] the methods and constitution of debate, discussion and persuasion.”⁴⁶ This is why the Internet is so important, Lessig, Sunstein and Wilhelm think, for it can clarify public thought by stimulating debate and communication online. Both critics argue for public safe havens on the Internet. Leaving the Internet to the market will only increase the problem of the public, because people are naturally inclined to follow their private wants.⁴⁷ In the absence of a public intent of consciously deliberating and organizing interests, commercial profit seeking and private interest satisfaction will start to dominate the Net.

I think that the suggestion to let the Internet play an important role in increasing the democratic legitimacy of politics only comes down to a digital *displacement* of the democratic deficit. Notwithstanding the initial appraisal by Lessig et al of its democratic benefits, the Internet appears to cope with deliberative problems similar to such problems off-line. It is indeed telling that Lessig et al portray *actual* communicative processes on the Internet rather disapprovingly too. Again, to them the problem is weighed against the publicity imperative: since the center of democracy is located in public discussion and civic activism, they judge the democratic potential of the Internet from this perspective. But although it seems attractive to support Sunstein’s claim that “[d]eliberative domains should provide a wave of the future [so that] the Internet might become a great ally of democracy,”⁴⁸ the irony is that by applying the ideal of the publicity imperative on the Internet, many communicative processes on the Internet become automatically part of the problem. Through the very logic of the publicity imperative, the Internet is transformed into a political instrument to work on its *own* democratic future. Although public deliberation online was considered to be something of an answer to the sick state of democracy, the Internet’s own poor democratic record actually

represents an obstacle. And since this conclusion only evokes another appeal to the publicity imperative, we can conclude that the deliberative argument about the relationship between democracy and the Internet runs into a vicious regress.⁴⁹

It seems wise to let the therapy depend on the diagnosis, rather than vice versa.⁵⁰ It is necessary first to understand what exactly the normative presuppositions of the publicity imperative are before we jump to an acclamation of its remedial merits for politics. I believe that focusing on the political value of the publicity imperative can only lead to a moral *deflation* of the publicity imperative for politics. Public deliberation is not the backbone of politics—which, of course, does not imply that such deliberation has no political value whatsoever. Looking at politics through the lens of the publicity imperative is problematic though. We should be suspicious of trying to understand the democratic deficit in a Deweyan way. The example of the Internet shows how preference formation on the Net is judged according to communicative standards that probably do not have much to do with how people active in that forum actually experience their communication. The deliberative paradigm creates a moral perspective and assesses whether individuals act accordingly. Yet, such an ideal-typical theory about digital processes of will formation says nothing about the specific character of these processes.

By politically deflating the publicity imperative, we can better focus on its non-political, or civil value. This understanding will bring us to a different judgment of phenomena on the Internet. We will find ourselves more in line with David Post's observations, for instance, when he writes:

When I gaze about the Net, even at those portions of the Net that have been invaded by the forces of 'commerce,' I see something that looks more like the chaos of unchecked growth and diversity than it does uniformity and regularity; its [*sic*] not just that new websites, and new architectures with them, seem to be sprouting like mushrooms after a spring rain, they actually *are* sprouting like mushrooms after a spring rain.⁵¹

Post's description of the Internet does not just have a different tone than Wilhelm's, Sunstein's or Lessig's; it is the result of a different *point of view*. Post locates the intrinsic democratic element in the vast disarray of private initiatives—commercial, science-fictional, biographical, psychological, sexual, artistic. He tells the story of a world of commercial giants and dominant governments, in which the Internet is very much the technology of freedom.⁵² Phenomena like the Open Source Movement, private weblogs, wireless network communities, P2P communication, podcasting, Second Life, Facebook, and the revolution of email traffic in general, last but not least, show how the Internet electronically empowers individuals to communicate. Post thus thinks that many practices on the Internet have a democratic legitimacy of their own, but in an apolitical sense. Many events and trends take place in open,

yet segmented and compartmentalized practices; they are enterprises with their own standards and are highly self-regulating. In these practices, people operate independently from political agencies that have a built-in proclivity to check the democratic legitimacy of such initiatives, whatever that may entail. Post stresses:

I have no quarrel with the notion that the code/architectures of cyberspace embed fundamental values, and I have no quarrel with the notion that each of us, confronting the design of these new cyberplaces, faces a choice among different values. ... But I do quarrel with the notion that because there are choices to be made among value-laden architectures, these are “political” decisions that should necessarily be subject to “collective” decision-making.⁵³

For sure, people show a great keenness to deliberate and exchange information about the quality of their digital communication, yet most of the time they do this independently from processes of political will formation. I would even hypothesize that people develop new practices on the Net precisely to be more free from practices that are more directly influenced by politics—blogs to be free from newspapers, file-sharers from the big music corporations, moveon.org from partisan politics, Open Source from classic copyright regulations, and so on. Perhaps it is therefore more apt to say that the motivation to perform on the Net grows not out of a political ideal but out of what I call a *civil ideal*, which avoids the ubiquitous pressure to justify and validate actions before the public *at large*.

I would like to state that civil practices should not be characterized as poor, potential, and private manifestations of deliberation, but as initiatives that have an intrinsic democratic quality. The publicity imperative obstructs a more optimistic interpretation of the democratic value of the Internet and increasingly transforms it from a solution into a problem. The case of the Internet shows that the real problem of democracy is not adequately understood, let alone solved, by emphasizing the publicity imperative, which blocks *other* perspectives to politics. Processes of will formation on the Internet are only understood as *conditional* to the ideal of political will formation; they are not being valued in themselves or, better, according to their own intrinsic standards. Social processes of will formation have many different standards of valuation, and their own political significance ought to be taken seriously. Without having followed ideal-typical procedures of deliberation and communication, the hundreds of thousands of postings for Wikipedia have made up an encyclopedia that can compete with the eminent standards of the Encyclopedia Britannica. And it is the same with blogging: an exceptionally diverse culture of homemade journalism has seen the light. The political question therefore is not the quality of Internet communication according to the ideal of public reason, for this question can only be answered substantively and contextually. Instead, the political

question is how Internet communication *relates* to the political system, that is, how the intervention of public authority into the institutional fabric of the Internet can be justified.⁵⁴ I call this the question of political jurisdiction.

1.4 Approaching the problem: The public/private distinction

In this section, I explain how the idea of the publicity imperative goes back to a specific interpretation of the public/private distinction. This should clarify the dominance of a conception of politics in which the transformation of people's preferences has obtained such a central place. My hesitation to see issues of the Internet through the perspective of the publicity imperative comes from a belief that politics is not about preference formation in the first place, but about something else. My contention is that this intuition goes back to the question of how to interpret the distinction between public and private.

The public/private distinction is an important conceptual compass in political theory. In the most general terms it refers to a normative relationship between the individual and the collective, in which "private" represents or refers to the interest of individuals or individual entities, while "public" represents the interest or significance of the political body as a whole (be it democratic, aristocratic, or autocratic). A recurring political question of the public/private distinction concerns the right ratio between the centripetal claims of the body politic and the centrifugal concerns of individuals.

In this respect, Richard Rorty's distinction between the "private ironist" and the "public liberal" is a good illustration of the *moral force* of the public/private distinction in political theory. The interesting thing, of course, is that Rorty is often depicted as a famous critic of the traditional liberal distinction between public and private. Rorty the postmodernist is well aware of the distinction's complexity. He is critical regarding overoptimistic didactic interpretations of the distinction and does not believe in a universal rationality that draws from the natural sentiments of solidarity.⁵⁵ To Rorty, the public/private distinction encapsulates two states or attitudes of the subject that deal with an *unsolvable* tension between what he calls "self creation" and "solidarity." The first state is "ironical" and belongs to the private sphere. The private ironist is someone who believes that his words, being the instruments for self-description, are basically contingent, non-final, and circular in explanation. They ultimately refer to a selfish state. Therefore, ironists are "never quite able to take themselves seriously because always aware that the terms in which they describe themselves are subject to change...."⁵⁶ So irony must be confined to the private sphere, Rorty says, for in the end ironist politics or public irony will be self-destructive to the political web.⁵⁷ It is individuals' own business to continuously change their perspectives on life,⁵⁸ yet there are also public aspects to their private vocabularies which pose another challenge—namely, "as much imaginative acquaintance with alternative final vocabularies as possible...."⁵⁹ In this

way, Rorty thinks, people will be socialized into becoming aware of other people's life stories. This educative process, that should be open to as many perspectives and narratives as possible, hopefully will let people acquire a sense of pragmatic urgency to avoid suffering and humiliation.⁶⁰ Yet, that's about it, Rorty believes: the public realm can only be a very limited space of collective action. Moreover, the path to public solidarity is shaky, to say the least; there is no neat transition from private existence to public solidarity.

Rorty's surprising solution is a strict division between public and private. Liberalism can be saved from metaphysics if public inquiry into private endeavors of meaning results in the discovery of some common truth that is morally superior. This hope, however, can only be based on its intrinsic desirability—that is, on the worth of political freedom as the condition for private irony.⁶¹ The typical liberal, to Rorty, is *not* the politician, academic or philosopher, but the artist, the journalist, or the poet, precisely because such figures are especially capable of bringing out that refined liberal sensitivity of “sharing a common selfish hope.”⁶² They are the true masters of ironist culture.

Rorty's minimalist solution for keeping the flame of liberal hope burning is a strong critique of the publicity imperative. He retains little faith in the exchange of reasonable arguments in a public debate between citizens that ultimately leads towards a just political constitution. It is therefore not surprising that most of Rorty's critics vehemently stress his anti-republican depoliticization and carefree aestheticization of politics. The result, they claim, is an elitist politics accompanied by private frivolity.⁶³ The question, however, is whether this critique is fair, as it is surprising to see how much Rorty's understanding of politics is *also* influenced by the dualistic relationship between the good life of the individual, on the one hand, and the ideal of public justice in the body politic, on the other. He uses the same normative division between public and private just as his more republican-minded critics do. Rorty also interprets politics as a system of values, as a pendulum that swings between the forces of egoism and altruism. Politics is ultimately a metaphor of moral development moving back and forth between self-interest and solidarity.⁶⁴ To Rorty, pragmatist politics is a will-formation process that ought to deliver good results—although not much should be expected. Political discussions deal with different types of value preferences, and the question is which of them ought to become part of the political discussion. In the end Rorty's critique of high republican expectations embedded in the publicity imperative remains nestled in this moralistic paradigm of politics.⁶⁵ His conclusion is skeptical: namely, that most private beliefs and preferences are not suitable to broach for public consensus at all, for which reason a very strict distinction between public and private is needed. Although Rorty strongly tones down the moral scope of the publicity imperative, his conclusion is still caught in that same political paradigm. Indeed, as with Lessig et al, it is not absurd to conjecture that Rorty has come to his skeptical conclusion

because he could not perceive politics in a different way. Rorty has only radically reduced the effect of the publicity imperative, strongly attenuating the expectations of the moral promise of politics, but without rejecting them.

It seems that the concept of the publicity imperative is difficult to lay aside. We have seen that the case of the democratic potential of the Internet turns into argumentative vicious regress, while Rorty's critique of the liberal public/private distinction only proves to offer a different way of articulating the publicity imperative. In other words, the publicity imperative is well knit into contemporary political thinking, and the question is how we are going to unravel it.

1.5 Explaining the problem: Freedom of speech and religion

To conclude this chapter, I would like to sketch a possible way out. As an illustration, I will use the debate about the relation between freedom of speech and freedom of religion.

Freedom of speech can be understood as the right to publicly express one's private opinion. This freedom, as it was classically set out by J.S. Mill, is widely seen as a vital ingredient of a liberal democracy.⁶⁶ Individuals should have the right to raise their voice even in the midst of the greatest conformism. Without the possibility of private dissent, there can be no question of democratically arriving at the public good. In Western societies today, however, the use of free of speech is not questioned by a majority but by a religious minority. Appealing to the freedom of religion, many Muslims have expressed reservations about the unlimited exercise of free speech—the graphic example being the Muslim outrage about the publication of sardonic cartoons by a Danish newspaper.⁶⁷ In their opinion, the right to free speech has degenerated into an unqualified claim to publicly criticize and insult their religion. They argue that the public bombardment of religious critique has undermined the very possibility to have religious beliefs.

This reaction has fuelled some fierce liberal chauvinism in which it is stressed that freedom of speech is the moral complement to freedom of religion: there can be no freedom of (private) religion without freedom of (public) speech.⁶⁸ Visually depicting Mohammed might be insulting to some Muslims, but since they are also citizens in a liberal democracy, they need to accept that there will be people who dispute their religion. The right to believe what one wants to believe implies the possibility to *publish* these beliefs—and this counts for everyone, believers and disbelievers alike. We meet again the Kantian linkage of conscience, thinking, and publicity. The right to freedom of opinion is impossible to defend if the individual right to criticize other opinions is being questioned. To be a free subject implies employing one's reason to the fullest while courageously accepting critique by others.⁶⁹ Citizens in this model are entitled to map out their idiosyncratic paths to happiness, but they all have to accept the possibility of a public clash between their own private endeavors and those of others. This is how liberal democracies work, the liberal says.

But what exactly is the place of religion in this argument? This question

is especially timely because an increasing number of people have difficulties in tolerating private opinions that are religiously inspired—especially Islamic opinions, to be sure.⁷⁰ Here the publicity imperative is applied to religious beliefs, but it is unclear how it can still be related to the contemporary liberal public/private distinction, in which religion is said to belong to the private sphere and politics to the public sphere.⁷¹ On the one hand, some scholars argue that the right to freedom of religion can only be possible if religion forfeits its stakes in the political arena. On the other hand, however, they say that since religious beliefs are comprehensive and possibly oppressive, they ought to be compatible with public reason. This way stated they *are* part of the political arena, which is demonstrated by John Rawls: “Of course, fundamentalist religious doctrines and autocratic and dictatorial rulers will reject the ideas of public reason and deliberative democracy. ... They assert that the religiously true, or the philosophical true, overrides the politically reasonable. We simply say that such a doctrine is politically unreasonable. Within political liberalism nothing more need be said.”⁷² Religion has to be put to the test in order to see if it is free of fundamentalism and thus can be part of the democratic framework.

The publicity imperative again has the final say: it transforms religious beliefs into moral opinions. On the one hand, freedom of belief is formally protected, taking for granted that not all of its aspects can be defended substantially in the public arena in terms of reason. At the same time, based on the freedom of speech, religious beliefs are open to public scrutiny. Believers ought to be prepared to accept public assessments even when they are unable to defend themselves in their own words. While discussion is an indispensable aspect of free speech, the opposite is the case for religion, in which dispositions such as contemplation, wonder, and hope are more appropriate. The believer has to step out of his or her private world, and find vocabulary that is in conformity with basic principles of public reason. The rational comes before the irrational. Rawls concurs: “A domain so-called, or a sphere of life, is not, then something already given apart from political conceptions of justice. [It] is simply the result, or upshot, of how the principles of political justice are applied....”⁷³ There is thus a principal friction between freedom of religion and freedom of speech, which cannot be dismissed as the classic dilemma of keeping the balance between the preferences of a dissenting minority and of a ruling majority. Precisely *in light of* the moral distinction between private and public preferences, the issue of religion acquires an awkward status in the discussion: religion needs to be private, not political, yet its rules and habits ought to be consistent with the political values of a liberal society. However, the metaphysical aspect of religion is not easy to place in public discussions. The publicity imperative makes it difficult to understand the place of religion—its unreasonableness and unjustifiability.

Only if we accept a more complex interpretation of the public/private distinction it is possible to do justice to the current discussion concerning the relation

between freedom of speech and freedom of religion. We need to break into the moral conception of politics and start distinguishing between believing, discussing, and deciding. These questions all relate to different relations with publicness, which cannot be properly understood by referring to a public/private distinction in which the private is represented by comprehensive ideas of the good life (of which religion is a part) and the public by political matters of justice.⁷⁴

1.6 Conclusion

The publicity imperative insists on a strong sense of democratic responsibility: citizens should publicly deliberate their private preferences. This is a forceful demand in political theory—and in daily politics as well, I should add. In this chapter, I have given a first impression of the difficulties of such a moral conception of politics. The discussion of the Internet and democracy has shown how preference formation on the Internet is instrumentalized in relation to the moral idea of politics as public deliberation. It takes away the concrete power of processes of preference formation on the Internet. Furthermore, we have seen how Richard Rorty could not detach himself from liberalism since, at the end of the day, he was working from the same perspective as his opponents. Rorty profoundly lowered the liberal expectations about citizenship without doing away with the moral assumption of democratic politics being a private preference transformer. From another point of view, I have tried to show how the publicity imperative negatively influences the debate about freedom of religion. Religious beliefs are judged in relation to their performance in public discussions. To believe is to have an opinion, and the very freedom to do so implies the possibility of being criticized for it and assumes the individual's preparedness to accept it.

Behind this identification of freedom of belief with freedom of speech lies the conviction that a political system can function only with an overlapping consensus of shared moral norms. A process of public deliberation is deemed necessary to counterbalance tendencies that point to the fragmentation of public morality. People need to become aware of constitutional essentials that provide a normative framework for an overlapping consensus. This is the very political condition of their freedom. Private morality, in other words, has a conditional status, depending on how it facilitates or obstructs public deliberation. Politics is based on the moral conflict between self-centeredness and other-centeredness. "If there wouldn't be any claim of the collective," Thomas Nagel is convinced, "there would be no morality, only the clash, compromise, and occasional convergence of individual perspectives."⁷⁵ Yet, as we have seen with the example of the Internet, many processes of communication cannot simply be dismissed as lacking democratic vigor. We need to investigate *different* conceptions of the public and private distinction more carefully and develop a more layered picture of morality and politics, a picture that does justice to the complexity of the social world.

(Notes)

¹⁸ M. Weber ([1901], 1958) *The Protestant Ethic and the Spirit of Capitalism*. Henceforth: *Protestant Ethic*. J. Habermas ([1962], 1996) *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*. Henceforth: *Structural Transformation*. I. Kant ([1786], 1999) "What is Orientation in Thinking?" Henceforth: "Orientation."

¹⁹ Weber, *Protestant Ethic*, pp. 111-112. Cf. C. Taylor ([1989], 1992) *Sources of the Self: The Making of Modern Identity*, pp. 228, 358. Henceforth: *Sources*. Martin Luther explains, however, that no amount or intensity of good actions will ever equal pure faith in God, "for faith alone and the word of God rule in the soul." Luther is aware of the anarchic implication of this idea, for ultimately not needing good works to justify one's faith implies no need of law as well; "and if [man] is free of the law, surely he is free from the law. ... This is that Christian liberty, our faith, which does not induce us to live in idleness or wickedness but makes the law and works unnecessary for any man's righteousness and salvation." M. Luther ([1520], 1968) "The Freedom of the Christian Man," p. 9.

²⁰ Weber, *Protestant Ethic*, p. 80.

²¹ Ibid., p. 103.

²² Cited in: Weber, *Protestant Ethic*, p. 100.

²³ A. McIntyre (1984) *After Virtue*, p. 38.

²⁴ I. Kant ([1784], 1970, 1999) "An Answer to the Question: 'What is Enlightenment?'," p. 59. Henceforth: "Enlightenment."

²⁵ I. Kant ([1786], 1970, 1999) "What is Orientation in Thinking?," p. 245, italics IK. Henceforth: "Orientation in Thinking."

²⁶ Ibid., pp. 239-240.

²⁷ Cf. R. Sennett (1990) *The Conscience of the Eye: The Design and Social Life of Cities*, pp. 7-9.

²⁸ Habermas, *Structural Transformation*, p. 7. See more on this in Chapter 7.

²⁹ Habermas, *Structural Transformation*, p. 23.

³⁰ See e.g. the anthology by F. D'Agostino and G.F. Gaus, eds. (1998) *Public Reason*. See also S. Macedo, ed. (1999) *Deliberative Politics: Essays on Democracy and Disagreement*.

³¹ See Chapter 3.

³² See also on the democratic deficit: N. Marres (2005) *No Issue, No Public*, pp. 5 ff.

³³ I define the Internet (uppercase I) as the worldwide collection of interconnected networks, which grew out of the original ARPANET and that uses Internet Protocol (IP) to link the various physical networks into a single logical network.

³⁴ See e.g.: S. Coleman and J. Götze (2001) *Bowling Together: Online Public Engagement in Policy Deliberation*; L. Dahlberg (2001) "Democracy Via Cyberspace: Mapping the Rhetorics and Practices of Three Prominent Camps;" L. Dahlberg (2001) "The Internet and Democratic Discourse: Exploring the Prospects of Online Deliberative Forums extending the Public Sphere;" A. Gimmler (2001) "Deliberative

Democracy, the Public Sphere and the Internet;" A. Malina (1999) "Perspectives On Citizen Democratisation and Alienation in the Virtual Public Sphere;" S. Sassi (2000) "The Controversies of the Internet and the Revitalization of Local Political Life;" R. Tsagarousianou (1998) "Digital Democracy and The Public Sphere: Opportunities and Challenges."

³⁵ Dahlberg, "The Internet and Democratic Discourse," p. 630.

³⁶ See, for instance, the object of the PhD thesis by Steven Schneider which he described as follows: "This thesis examines a conversation about abortion that occurred within the Usenet newsgroup 'talk.abortion' between April 1, 1994 and March 31, 1995. It tests the hypothesis that the form of discourse fostered by computer-mediated discussion provides opportunities to expand the informal zone of the public sphere. Specific criteria by which a public sphere can be evaluated for its goodness of fit with the idealized public sphere described by Habermas are proposed and applied to the ongoing conversation." See S.M. Schneider (1997) *Expanding the Public Sphere through Computer Mediated Communication: Political Discussion about Abortion in a Usenet Newsgroup*, p. 2. Compare A.M. Froomkin (2003) "Habermas@Discourse.Net: Towards a Critical Theory of Cyberspace," p. 753: "New technology may, however, increase the likelihood of achieving the Habermasian scenario of diverse citizens' groups engaging in practical discourses of their own."

³⁷ A.G. Wilhelm (2000) *Democracy in the Digital Age: Challenges to Political Life in Cyberspace*, p. 4.

³⁸ L. Dahlberg (2004) "The Habermasian Public Sphere: A Specification of the Idealized Conditions of Democratic Communication," pp. 2-3.

³⁹ Anthony Wilhelm translates the conditions for ideal communication into several socioeconomic categories, resulting in a schema that he terms a "resource model." This model consists of the variables "occupation" (e.g. skill development), "education" (e.g. literacy, numeracy), and "income" (ability to purchase teletechnologies). These are conceptual tools, as it were, which are central in empirical analyses that eventually should lead to the empowerment of people in the virtual public sphere, by adjusting means and methods according to the result of these empirical analyses. See his *Democracy in the Digital Age*, p. 51.

⁴⁰ Lessig, *Code*, p. 59, italics LL. See also A.S. Laden (2002) *Reasonably Radical: Deliberative Liberalism and the Politics of Identity*, pp. 5-6: "[T]he authority of philosophy is simply the authority of democratic politics." Henceforth: *Reasonable Radical*.

⁴¹ Lessig, *Code*, p. 228. And: "Our role in relation to our government is that of a stakeholder with a voice. We have a right – of the government is to be called democratic – to participate in its structuring." Ibid., p. 200.

⁴² Wilhelm, *Democracy in the Digital Age*.

⁴³ Sunstein, *Republic.com*.

⁴⁴ Here I partly follow G. Drosterij (2003) "Democrazia complessa: una critica della democrazia digitale deliberativa," pp. 183-200.

⁴⁵ Wilhelm, *Democracy in the Digital Age*, p. 44. Cf. *ibid.*, p. 4.

⁴⁶ Cited in: Sunstein, *Republic.com*, p. iv. See more on Dewey in Chapter 8.

⁴⁷ Sunstein, *Republic.com*, p. 16.

⁴⁸ *Ibid.*, p. 212.

⁴⁹ S. Blackburn ([1994], 1996) *The Oxford Dictionary of Philosophy*, p. 324.

Henceforth: *Dictionary of Philosophy*.

⁵⁰ N. Elias ([1939], 2000) *The Civilizing Process. Sociogenetic and Psychogenetic Investigations*, p. 544, nt. 2.

⁵¹ D.G. Post (2000) "What Larry Doesn't Get: A Libertarian Response to Code and Other Laws of Cyberspace," p. 21, italics DGP.

⁵² Post comments on the genesis of Napster: "Who would have thought that it would come, not in the form of some gigantic machine housed in the basement of Time-Warner or Sony Music Corporation, but as a simple string of code written by a 19-year old?" D.G. Post (2000) "Jefferson's Moose, and the Law of Cyberspace," p. 5.

⁵³ Post, "What Larry Doesn't Get," p. 24.

⁵⁴ See in depth Chapter 3.

⁵⁵ "The part of a liberal ironist's final vocabulary which has to do with public action is never going to get subsumed under, or subsume, the rest of her final vocabulary." R. Rorty (1989) *Contingency, Irony, and Solidarity*, p. 120. Henceforth: *Contingency*.

⁵⁶ *Ibid.*, pp. 73-74.

⁵⁷ *Ibid.*, p. 87. "I cannot imagine a culture which socialized its youth in such a way as to make them continually dubious about their own process of socialization." If irony is not in place here, however, Rorty's public/private distinction gets a schizophrenic twist: being in constant doubt and making queries about one's private life carries a serious risk of becoming weary about the surrounding social structures. It seems doubtful whether Rorty's idea of private irony stands a real chance within this environment of continuous skepticism.

⁵⁸ "The easiest way of doing that is to read books, and so ironists spend more of their time placing books than in placing real live people." *Ibid.*, *Contingency*, p. 80.

⁵⁹ *Ibid.*, p. 92.

⁶⁰ *Ibid.*, p. 93.

⁶¹ "We ironists who are also liberals think that such freedoms require no consensus on any topics more basic than their own desirability." Rorty, *Contingency*, p. 84.

⁶² *Ibid.*, p. 92. "Solidarity has to be constructed out of little pieces, rather than found already waiting, in the form of a ur-language which all of us recognize when we hear it." *Ibid.*, p. 94.

⁶³ See for an overview of these criticisms: N.P. Monteiro (2003) "No Knights in the Bazaar!? The Role of the Private/Public Distinction in Richard Rorty's Political Philosophy."

⁶⁴ "The ultimate political synthesis of love and justice may thus turn out to be an intricately-textured collage of private narcissism and public pragmatism." Rorty cited in: Monteiro, "No Knights in the Bazaar!?", p. 10.

⁶⁵ Rorty terms the dual demand of self-creation and human solidarity a “moral dilemma.” Rorty, *Contingency*, p. xv.

⁶⁶ J.S. Mill ([1859], 1993) *On Liberty*: “Protection, therefore, against the tyranny of the magistrate is not enough: there needs to be protection also against the tyranny of the prevailing opinion and feeling....”

⁶⁷ One cartoon depicted the prophet Mohammed as a suicide terrorist.

⁶⁸ In the Netherlands, the publicist Paul Scheffer is a proponent of this theory. See his *Het land van aankomst*.

⁶⁹ Or as Ayaan Hirsi Ali has put it: “Freedom of speech implies the right to offend.” (Berlin speech, February 2006).

⁷⁰ Here I follow to a great degree my (2004) “Tolerantie is niet vanzelfsprekend.”

⁷¹ To be sure, this distinction is not the *classical* liberal distinction, but has its roots in American Postwar liberalism. See Rorty’s rather revealing depiction of this idea: “The process of de-divinization ... would, ideally, culminate in our no longer being able to see any use for the notion that finite, mortal, contingently existing human beings might derive the meanings of their lives from anything except other finite, mortal, contingently existing human beings.” Rorty, *Contingency*, p. 45.

⁷² Rawls, “Idea of Public Reason Revisited,” p. 178.

⁷³ *Ibid.*, p. 161. Cf. Rawls, *Political Liberalism*, p. 41: “We have no prior identity before being in society....” Cf. the psychological parallel, stated by Charles Taylor: “[M]y discovering my own identity doesn’t mean that I work it out in isolation, but that I negotiate it through dialogue. ... My own identity crucially depends on my dialogical relations with others.” C. Taylor ([1992], 1994) “The Politics of Recognition,” p. 34.

⁷⁴ See more on this in Chapter 7.

⁷⁵ T. Nagel (1991) *Equality and Partiality*, pp. 3–4. Cf. Scheffer, *Land van aankomst*, p. 405. Cf. J.H. Carens (2000) *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness*, p. 9: “For liberal democracies to work properly and to endure over time, certain norms, attitudes, and dispositions must be widely shared among the population.”

CHAPTER 2

The Public and the Private: Bridging Idea and Theory

2.1 Introduction

I have argued that the complexity of political theory has been damaged by the domination of the publicity imperative. The idea that the essence of politics is public discussion has become a persistent stopgap for fixing the democratic deficit. I suggest looking beyond this one-dimensional interpretation of politics, and taking the conceptual diversity of the public/private distinction seriously is an important step in this project.

I consider political theory to be a normative science, with optimal practice in politics as its common object. In political theory, political phenomena are studied and concepts formulated that explain these phenomena from the perspective of what the activity of politics should be. The important question is what *makes* life “political,” for obviously, no phenomena are political per se, only phenomena that may be interpreted as such. Because political theory is a construction of reality, we should look for the idea or perspective that *informs* the political-theoretical approach in which phenomena are eventually given their political status.⁷⁶ The public/private distinction, in this regard, functions as a conceptual bridge: it regroups certain basic ideas into a political-theoretical system that is supposed to have explanatory or demonstrative power. In Chapter 1, we have seen how the particular idea of the publicity imperative informed a public/private perspective that has led to a moralistic interpretation of politics.

In order to take the complexity of politics seriously again, however, we will need to consider a *cluster* of conceptions of the public/private distinction, because a variety of basic ideas that are equally important inform political theory. These different public/private distinctions will be set out in the course of the book.

In this chapter, I first give an account of the theoretical status of the private/public distinction. The chapter takes off with some views concerning that distinction’s merits and flaws (section 2.2). The fact that “public” and “private” are container concepts frequently results in the claim that the distinction is ideological — that it lacks any real analytical power because it has lost a connection with the “real” world. Such an understandable yet erroneous reaction squanders the distinction’s great value for political theory. I will argue that by distinguishing between approach (the intellectual idea one wants to get across) and method (the way this job is done theoretically) it is possible to rescue the public/private distinction from the kind of radical critique that it leads to unjustified essentialism. In section 2.3, I demonstrate this conjecture by reviewing a book by Raymond Geuss about the public/private distinction: *Public Goods, Private Good*. I have reserved a central place for this book not only because

it nicely scrutinizes the merits of the public/private distinction, but because it does so by an implicit exhibition of the writer's *personal* approach to political philosophy. Precisely this combination of analytic rigor and elucidation of stance is interesting; it illustrates the interdependency of science and metaphysics. I will argue that Geuss's approach to philosophy illustrates how it is the pre-theoretical mind that pushes the scholar onto the path of examination. This underlying motivation gives theory a non-rational twist. I claim that working with the public/private distinction is not only a theoretical, but also metaphysical activity.

2.2 The public/private distinction: Great idea or great ideology?

The public/private distinction is a promising conceptual carrier of many political intuitions—for which reason, perhaps, the concept is so familiar in political theory.⁷⁷ It captures the political-theoretical imagination and gives direction to political thinking from various angles—for instance, regarding the relations between the individual and society, privacy and security, market and state, and sex and social conventions. The distinction has intellectual power, yet it is semantically versatile, as well. It carries the risk of undermining its own proficiency.

The wide array of meanings of the public/private distinction has led Raymond Geuss to question its theoretical viability altogether. Geuss thinks that the distinction is unavoidably essentialist or arbitrary, and cannot do justice to the intricacy of social phenomena. The distinction distorts and redefines them along lines of power or according to other vested interests.⁷⁸

Norberto Bobbio, however, hails the public/private distinction as a highpoint in (Western) legal and political theory. He is impressed by its illustrious history and not bothered by any interpretational uneasiness. He calls it a "Great Dichotomy," firstly because it is an *exhaustive* dichotomy that covers every element of the political world. Secondly, the dichotomy is *mutually exclusive*, he argues, since no element of the political world can be covered simultaneously by both concepts. Thirdly, it is a *dominant* dichotomy, for "it subsumes other distinctions and makes them secondary."⁷⁹

Bobbio argues that the Roman distinction between public and private law, especially, has proven its great value. The classical conception has been succinctly described in Justinian I's *Corpus Iuris*: "Public law is that which pertains to the Roman State, private that which concerns the well-being of the individual."⁸⁰ The distinction refers to a division between the general good of the republic and that of its people separately, a division that is "exhaustive," says Bobbio, for it dominates all other legal distinctions. Moreover, the categories of private and public are employed inter-reliantly: they "mutually [define] themselves in the sense that the public domain extends only as far as the start of the private sphere (and the reverse is also true)."⁸¹ Finally, they are hierarchically proportioned: first comes the general interest, regulated by a superior authority (i.e., the state), then individual interests,

regulated by single members of that group, defined by the general interest.⁸² The *res publica* ultimately overrules the *res privatus* in Roman law.⁸³ According to Bobbio, the original meaning of the public/private distinction is thus a reflection of the situation of a group which distinguishes between what belongs to the group as a group and what belongs to single members or, more generally, between the society as a whole and other incidental, lesser groupings (such as the family) or else between a superior central power and inferior peripheral powers which enjoy only a relative autonomy, if any.⁸⁴

It is fair to say that Bobbio is leaning heavily on a well-known and often-used interpretation of the Roman public/private distinction and is neglecting other possible historical interpretations. Geuss indeed argues that the etymological origin of the “publica” component in *res publica* is far from clear. It stems from the adjective *publicus* and the noun *populus*. In the course of Roman times, *populus* shifted from (1) “the body of men under arms to the whole population”⁸⁵ to (2) the more abstract and judicial meaning of the Roman people as a whole and ultimately to (3) “the body of citizens.” It is the same with *publicus*, whose meaning also has shifted from fairly concrete, viz., (1) the property of the army, to much more abstract connotations, viz., (2) “the status quo of power relations that exist among Romans,” (3) “matters of common concern to all Romans,” and (4) “the common good of all Romans.”⁸⁶ Hence, Bobbio seems to overestimate the undisputed clarity of the Roman distinction between public and private. On this point, Geuss argues that the concept of the State in the unitary fashion in which we have come to know it was unfamiliar to the Romans and cannot accurately be read into their philosophy.⁸⁷

As I noted earlier, already, Geuss is skeptical about the conceptual clarity of the distinction between public and private. “There is no such thing as *the* public/private distinction, or, at any rate, it is a deep mistake to think that there is a single substantive distinction here that can be made to do any real philosophical or political work.”⁸⁸ The terms “private” or “public” in themselves neither explain nor justify a certain design, action, preference, or interest; rather, Geuss stresses, they facilitate and legitimize a carefree application of ideas until they regress into worrisome ideologies.⁸⁹ For instance, if someone wants to interfere with something I call my own business and wants my explanation for my behavior, I cannot answer that he should keep out “[b]ecause it is private,” says Geuss.⁹⁰ This would only be a reformulation, not an explanation of the point. And any subsequent explanation for a desired privacy that is more specific will likely turn into a narrative that will eventually be impossible to characterize as an instance of *the* public/private distinction. Still, Geuss claims, many liberals⁹¹ do point out the existence of a private realm which is “a politically and socially distinct and protected sphere of life within which each individual is and ought to be fully sovereign, and ... contrast this sphere with a public world of law, economics, and politics....”⁹² This dualistic idea is naive and illusionary, he thinks. These alleged distinct spheres do not exist,

with so many diverse and highly contested ideas of reality, which is “criss-crossed with divisions and swarming with tribes, corporations, states, social movements, alliances, ‘nations,’ oppressing and oppressed populations who have radically different resources, power, institutional structures and conceptions of the good.”⁹³ Hence, Geuss says, “we will be stuck with a welter of various kinds of goods, some private, some public, with no clear principle for structuring them under a single conception of a unitary good.”⁹⁴ A proper genealogy of the public/private distinction would reveal the many issues that are structured by the same distinction and, hence, would highlight its artificiality: “A discussion of human shame and how to deal with it in a social context is a question that is in principle distinct from the question of the ownership of the postal system or the rail network by the government or profit-driven capitalist corporations.”⁹⁵

Geuss’s way out is a less utopian and ideological idea of the public good. This approach has serious consequences for a political theory — liberalism — that has relied so heavily on this dichotomy. Strangely enough, though, despite his austere critique of the liberal public/private distinction, Geuss gives no example of an *exclusivist* interpretation of the liberal public/private distinction. Though he names several, probably typical, liberal principles, such as “antipaternalism,” “respect for private property,” “limitation of state powers,” or the idea of the “public good,” he does not demonstrate that liberals claim all these principles as *species* of one liberal public/private *genus* distinction, the distinction Geuss has set himself up to argue against. Indeed, the very fact that Geuss *distinguishes* between these different liberal interpretations of the public/private distinction seems to neutralize, if not contradict, his primary thesis that “there is no single clear distinction between public and private.”⁹⁶ Another problem would be to denote what Geuss exactly means by *the* liberal public/private distinction, given the existence of so many different intellectual positions that liberals themselves have taken over time (from Kant to Mill, from Hobhouse to Hayek, from Popper to Rawls).

2.3 Raymond Geuss’s approach to political theory

Still, the most important point Geuss is keen to get across seems to be the methodological one. He fiercely rejects a deductive and counterfactual approach to political theory as advocated by Rawls,⁹⁷ Habermas and the like. The liberal method, he writes, is doomed to failure due to its unrealistic but also highly normative message.⁹⁸ “My general aim is to get away from a certain approach to political philosophy that presents itself as being particularly systematic but which is, in my view, merely abstractive, reproducing in a general form *fables convenus*.”⁹⁹ Geuss’s message can be interpreted as a critical note to *many* proponents of the Anglo-Saxon political-analytic school.

Geuss’s critique of the public/private distinction is convincing insofar as he carefully shows the semantic inconclusiveness of the distinction. Moreover, he

correctly stresses that a constructive abstraction from reality should not be made by means of counterfactual or hypothetical assumptions, for it would lead to the very disappearance of reality's complexity.¹⁰⁰

[I]t is not the case that we must or should adopt a two-step procedure, *first* getting clear about the public/private distinction, assuming all the while that there is a single distinction to be made, and *then*, having discovered where the line falls between public and private, going on to ask what we can do with that distinction, what attitude we should adopt toward it, what implications making the distinction correctly might have for politics. Rather, *first* we must ask what this purported distinction is *for*, that is, *why* we want to make it at all. To answer this question will bring us back to some relatively concrete context of human action, probably human political action, and it is only in the context of connecting the issue of the public and the private to that antecedent potential context of political action that the distinction will make any sense.¹⁰¹

Geuss says that the art of abstraction lies in the capacity to *retain* a sense of reality; otherwise, theory becomes empty and ideological. This conjecture makes indeed a lot of sense, and hopefully will be the starting point of any study. Political theory should abstract from reality without obscuring reality's complexity.

So, Geuss does not dismiss the fact that any study of complex and contingent situations starts with preliminary distinctions. I would add, however, that such distinctions are not—as Geuss would have it—necessarily morally restrictive, remain in noncommittal abstractions, or articulate human action in an absolutist way. Conceptual constructions are unavoidable in science, and distinctions about our rich (or chaotic) world have the welcome effect of a director's first cut or a painter's sketch. A distinction between private and public can provide for this kind of broad coverage, as well, I argue.¹⁰²

It is interesting to see how Geuss himself drafts his public/private concept. He clearly appreciates a down-to-earth, non-metaphysical approach, making an appeal for reconstructing the categories of private and public through what he calls a "naturalistic" view of the world. Elements of the human condition do not present political ideas to us on a silver platter; instead, they "are factors on which we will have to fix our attention carefully and have reflective views, if we want to be serious about understanding politics."¹⁰³ Thomas Hobbes was such a scholar, Geuss writes, someone who operated in a levelheaded manner. Hobbes took things such as the biological need for food or shelter, the fact of mortality, and the drive for self-preservation as a starting point for his political ideas. This is not to say, as Geuss stresses, that Hobbes's ideas were ultimately the right political answers to the human condition, but that his approach towards them was sound.

Geuss puts certain basic human “facts”¹⁰⁴ in the center of intellectual attention. This is the only sensible response to an indeterministic worldview, he believes. Interestingly, in this respect the public/private distinction can be understood as a dichotomous conceptualization of phenomenological experiences, such as the “‘public’ mutual ignorance of the ‘private’ intentions of individuals.”¹⁰⁵ The distinction between public and private brings certain basic human phenomena into spatial perspective, although the conceptual specification may completely differ: emphasizing man’s irrationality, for instance, can as easily result in a theory of Leviathan as of Utopia.¹⁰⁶

Geuss is keen to change political discourse by bringing it back to practical essentials. We should ask ourselves why we would want to *use* the public/private distinction and what purpose it serves. Geuss strives for a “*practically significant* distinction between public and private” that is sensitive to the question of what reason underlies such a distinction—i.e., for the realization of what good.¹⁰⁷ Only in that way can we get rid of utopian and moralistic political theories. It will lead to public/private distinctions “for particular purposes in particular contexts.”¹⁰⁸

By pinpointing the importance of the practical use of the public/private distinction implies that Geuss needs to explain the way the practical value of the distinction is judged. Yet, he does not say much about this, except by indirectly referring to his genealogical method, which is influenced by Nietzsche and Foucault.¹⁰⁹ He appropriately calls it *perspectivism*: “[t]he view that the history of our present extends back indefinitely, but our possible cognitive grasp of that past eventually peters out in the same way. That is, the farther back we go the less information we will have and the vaguer will be the outlines of the story we can tell.”¹¹⁰ In this respect, he says, the public/private distinction “results from a complicated historical process in which originally completely *distinct* elements ... come to be conjoined.”¹¹¹ The genealogy of history examines the values that have been produced by certain institutions (or, for that matter, conceptualizations): that is, “what level of culture [history] has made possible for humans to attain.”¹¹² In other words, constructing a public/private distinction (or distinctions) would be considered “practically significant” if it realized human values or a certain culture that is to be applauded in Geuss’s eyes. This result does not mean that the distinction is “true,” Geuss is keen to stress, but, as he paraphrases Nietzsche, that it does better justice to one’s self-affirmation (of life).¹¹³ He further explains this almost aesthetic perspective: “Any morality will represent only one choice among a potentially infinite plurality of possible objects of admiration, although it won’t be a ‘choice’ any individual human being makes *ad libitum*; as such it will always float over a lagoon of anarchic, partially unstructured acts of individual admiration and disgust.”¹¹⁴

2.4 Political metaphysics

The above analysis shows that the distinction between theory and approach is

important. Our very incapacity to know how our forebears lived their lives, for instance, should bring caution in the design of our own world, Geuss says. An awareness of our own conceptual limitations should teach us to stick to basic facts of life, and perceive the human fabric of the world with great care and detail.

Still, there are peculiarities in Geuss's approach. Ironically, he introduces his perspectivist approach as an alternative to theoretical essentialism. Nevertheless, Geuss is very explicit about his thoughts on the human race and its history. His perspectivism can be said to depend on a *pre-theoretical* outlook that informs his further theorizing. Perspectivism, as Geuss himself puts it, sees the social and political world as "a large, unsurveyable, and extremely unwieldy object," while "the living past is overwhelmingly a realm of gross historical contingency."¹¹⁵ An essentialist or metaphysical position seems to inform Geuss's conceptualizations. Geuss himself gives the impression that his perspectivism, accompanied by some ideas about basic human experiences, is a commonsensical way of debunking metaphysical conceptions of the private/public distinction. To me, however, it is just another metaphysical standpoint—anti-essentialist metaphysics, perhaps. This is not a revolutionary statement, given that I understand metaphysics not as a search for a monolithic truth about the world but as a reflection on aspects of human existence that cannot be expressed in the language of the natural or social sciences. The utter intricacy of the world brings with it a body of knowledge that lies beyond the empirical or physical realms but nevertheless plays an important part in science. This knowledge "exists" and is expressed in music, poems, philosophies, fairy tales, beliefs, and the like. It plays its part in weaving the web of human cultures. J. Trusted writes: "If metaphysics is overtly rejected either there must be complete scepticism as to knowledge of anything but personal sensations or else metaphysical beliefs will be covertly smuggled in to the purportedly metaphysics-free system. For ... we must make some assumptions that are not derived from [empirical] experience."¹¹⁶ The observation that numerous interpretations of the world have existed in different times and places¹¹⁷ should remind us that, although we carry our view of the world as a truth, it is in theory a relative truth. This acknowledgement rescues to speak of metaphysics and certainly does not have to lead to its rejection. As Otto Duintjer puts it:

Assertions from traditional metaphysics are not simply untrue or nonsensical, yet their validity span is more limited than usually assumed. ... Ontological statements do not refer to *the* reality in itself, but clarify our understanding of what we take as 'existence' or 'reality,' given the context of a certain praxis, or broader, given a dominant world view within a certain time and culture.¹¹⁸

So, while the world is filled with constructed artifacts, intuitions and ideas play an influential role underneath such theoretical architectures. This is no exception in

political theory. And that observation is exactly the great merit of Geuss's book. Besides being scholarly and sharp, it provides us with an inside view of a political philosopher's position in the world, and how his intellectual work proceeds from it. A view such as this one is quite rare, to be sure. Geuss gives the reader an excerpt of his academic state of mind, or, as Alasdair MacIntyre has written, "puts in question not just this or that particular philosophical thesis, but some of the larger projects in which we are engaged."¹¹⁹ Political theory is not just an analytic puzzle about conceptions that need to be cohesively ordered, with no place for the connection between theoretical activity and the world itself. Doing political theory requires not only defending conceptual cohesions, but also explaining where those conceptions come from and what are the informing ideas behind them. This more engaged practice is political metaphysics.

Because our relationship with the world permeates our thinking in general, keeping this caveat in mind when doing philosophy is not so much an autobiographical frivolity as a necessary inquiry into the sensational¹²⁰ and idealist aspects of theorizing. As I will argue more fully in Chapter 4, this non-linguistic or intuitive component of philosophy is not to be underestimated. Without pathos there will be no theory, as is nicely explained by Martin Heidegger (inspired by the Greeks): "The *pathos* of astonishment thus does not simply stand at the beginning of philosophy, as, for example, the washing of his hands precedes the surgeon's operation. Astonishment carries and pervades philosophy."¹²¹ Differently put, philosophy can be called *paradigmatic* in the double sense that Thomas Kuhn attached to the word. Philosophy is based both on exemplars and their rationalizations. More specifically, political theorizing is fed by a metaphysical impression of the world that is both particular (based in experience) and general (based in thought). Politically experiencing the world and simultaneously putting this experience into conceptual terms is a back-and-forth process that provides food for political thought.¹²² Geuss's perspectivism is typical of a metaphysical theory that is dominated by certain particular experiences. Since the relation between experience and idea can be very intimate, with the choice of a particular theoretical perspective being tied up with one's own view of the world, the process of political theory cannot be *fully* reconstructed and accounted for. Predilections of thinking can be justified and explained to a great extent, but some of them fall short of explanation since they are tied to the theorist's own idea of world. I would say that to "be" a "pragmatist" or an "idealist" is ultimately not an autonomous choice but a stance, a way of life, and thus ultimately unjustifiable—which, of course, does not imply that nothing can be said about it. This peculiar but also beautiful aspect of science, the intimate co-existence between one's particular experience and one's general view of the world, is important to include when theorizing the act of reflection itself (e.g., political theory). As scholars, our pre-theoretical stance determines to a considerable extent the substantial and normative outcome of the theorizing process.¹²³

2.5 Conclusion

Practicing political philosophy is guided not merely scientifically but also non-scientifically. Without a strong desire for discovery, the readiness to understand and analyze will remain latent. Science appeases a hunger that is intellectual yet is produced by non-rational sentiments. Such sentiments are the source of intellectual curiosity and give theory, inevitably, a metaphysical edge. The public/private distinction, in this respect, serves as a conceptual bridge between metaphysics and theory. It informs political theory in two ways: on the one hand, by conceptualizing very particular experiences of reality, and on the other hand, by helping to generate and structure highly abstract ideas. Directed towards an anthology of ideas but still rooted in concrete cases, the distinction is a manifestation of both particularity *and* abstractness. Political theory is thus informed by basic ideas and experiences that can be very well articulated by the public/private distinction. Utilizing the distinction effectively, however, requires taking its great conceptual ambiguity into account. This is only to be expected, since theorizing the categories of public and private means taking account of the many complexities intrinsic to life itself; political theory needs to incorporate and not simplify them. Carefully differentiating the public/private distinction in the course of this study is the way to adequately explain the different aspects of thinking about the polity. The public/private distinction does not represent an overriding truth but is a conceptual tool to excavate certain ideas that do play an important role in the fabric of our individual, social and political world.

(Notes)

⁷⁶ Some say that this question of the underlying perspective of theory cannot be answered in the first place. See, e.g., Rorty, *Contingency*, p. 45. The conjecture of this chapter is that *any* theoretical investigation is tied to a worldview, if only because originating from a *personal* source. In general, it is interesting to relate the process of theorizing to academic self-reflection—something not often done in the field of political theory.

⁷⁷ See, for example, the following studies: S.I. Benn and G.F. Gaus, eds. (1983) *Public and Private in Social Life*; M. Passerin d'Entrèves and U. Vogel (2000) "Public and Private: A Complex Relation" (2000); J. Weintraub and K. Kumar, eds. (1997) *Public and Private in Theory and Practice: Perspectives on a Grand Dichotomy*; S.I. Benn and G.F. Gaus (1983) "The Public and The Private: Concepts and Action" (henceforth: Public and Private); J. Weintraub (1997) "The Theory and Politics of the Public/Private Distinction."

⁷⁸ Cf. feminist criticisms: J. Tronto (1993) *Moral Boundaries: A Political Argument for an Ethic of Care*; C. Gilligan (1982) *In a Different Voice: Psychological Theory and Women's Development*.

⁷⁹ N. Bobbio ([1989], 1978) *Democracy and Dictatorship: The Nature and Limits of State Power*, pp. 1-2. Cf. R. Sennett ([1974], 1992) *The Fall of Public Man*, p. 16.

⁸⁰ A. Erh-Soon Tay and E. Kamenka (1983) “Public Law – Private Law,” p. 67.

⁸¹ Bobbio, *Democracy and Dictatorship*, p. 2.

⁸² At the basis of this distinction is the Aristotelian division between commutative (corrective) and distributive (proportionate) justice. The first is private, and “is manifested in distributions of honor or money or the other things that fall to be divided among those who have a share in the constitution,” and the latter is public, “which plays a rectifying part in transactions between man and man.” Aristotle ([340 BC], 1925, 1980) *Nicomachean Ethics*, 1130b30-1131a2. See more about the Greek public/private distinction, Chapters 5 and 6.

⁸³ See for an opposite view: Erh-Soon Tay and Kamenka, “Public Law – Private Law.”

⁸⁴ Bobbio, *Democracy and Dictatorship*, p. 3.

⁸⁵ R. Geuss ([2001], 2003) *Public Goods, Private Goods*, p. 36.

⁸⁶ Ibid.

⁸⁷ “In contrast to the moderns they [the Romans, GD] were not troubled in imagining a social entity with more or less a balance of power and/or authority independently of a social entity being sociologically organized and structured.” Ibid., p. 124, nt. 12. See, however, Bobbio, *Democracy and Dictatorship*, p. 11: “Public law as a systematic body of norms came into existence much later than private law, actually only in the era of the formation of the modern state.....”

⁸⁸ Geuss, *Public Goods, Private Goods*, p. 106, italics RG. Cf. Benn and Gaus, “Public and Private,” p. 3: “[The opposition of public and private] suggests that privateness and publicness are homogeneous properties, which, given their range, is highly unlikely.”

⁸⁹ Geuss, *Public Goods, Private Goods*, p. 10.

⁹⁰ Ibid., p. 107, italics RG.

⁹¹ Geuss names “Max Weber, Isaiah Berlin, Hayek, Habermas, Richard Rorty, Michael Walzer, and any contemporary theorist or political actor who has been seriously influenced by Mill’s *On Liberty*.” Ibid., p. 115, nt. 9.

⁹² Geuss, *Public Goods, Private Goods*, pp. 4-5.

⁹³ Ibid., pp. 98-99.

⁹⁴ Ibid., pp. 103-104.

⁹⁵ Ibid., pp. xix-xx. However, as Geuss stresses, the “[d]issolution of the identity of the distinction will not mean that all the parts into which it is dissolved—the various historically specific subsenses of ‘public’ and ‘private’—are necessarily incoherent or useless, only that it will be necessary to rethink arguments that appeal to the distinction as a clear unitary one, and reformulate them. The problems of politics will need to be seen in a new light.” Ibid., pp. xvii-xviii, italics RG.

⁹⁶ Ibid., p. 6. See also the review of the book by Richard Kraut. “That there are several kinds of privacy does not impugn the liberal doctrine that one or more of them are of great political significance and deserve protection.” R. Kraut (2004) “Review of: ‘Public Goods, Private Goods,’” p. 3.

⁹⁷ In making this point, Geuss refers in a footnote to his article “Weder Geschichte noch Praxis: Zur Politischen Philosophie von John Rawls.”

⁹⁸ For a differently stated critique on the deductive approach, see R. Unger (1986) *The Critical Legal Studies Movement*, Chapter 4.

⁹⁹ Geuss, *Public Goods, Private Goods*, p. viii.

¹⁰⁰ To quote a well-known example of such an approach: “[W]e must find some point of view, removed from and not distorted by the particular features and circumstances of the all-encompassing background framework, from which a fair agreement between persons regarded as free and equal can be reached.” Rawls, *Political Liberalism*, p. 23. Another crucial element in Rawls’s approach is his idea of “democratic society viewed as a system of fair cooperation between free and equal citizens who, as politically autonomous, willingly accept the publicly recognized principles of justice specifying the fair terms of cooperation.” *Ibid.*, p. 24, n. 27. For a radical example of counterfactual moralism: J. Habermas (1993) *Justification and Application: Remarks on Discourse Ethics*, p. 12: “Moral-practical discourse ... require[s] a break with all of the unquestioned truths of an established, concrete ethical life, in addition to distancing oneself from the contexts of life with which one’s identity is inextricable linked.”

¹⁰¹ Geuss, *Public Goods, Private Goods*, pp. 106-107.

¹⁰² Cf. H.P. Glenn ([2000], 2004) *Legal Traditions of the World*, pp. 350 ff. As Habermas has remarked concerning the inherent ambiguity of the public/private distinction: “[T]he very conditions that make the inherited language [of the distinction, GD] seem inappropriate appear to require these words, however confused their employment.” Habermas, *Structural Transformation*, p. 1. Cf. Geuss, *Public Goods, Private Goods*, pp. xiv-xv.

¹⁰³ Geuss, *Public Goods, Private Goods*, p. 110.

¹⁰⁴ “I do not mean that they have any peculiar or special metaphysical status or that a proper understanding of them will, by itself, tell us automatically how to structure our political life, only that they are factors on which we will have to fix our attention carefully and have reflective views, if we want to be serious about understanding politics.” *Ibid.*, p. 119.

¹⁰⁵ *Ibid.*, p. 112. Cf. B. Moore Jr. (1984) *Privacy: Studies in Social and Cultural History*, p. 81.

¹⁰⁶ Cf. Geuss, *Public Goods, Private Goods*, p. 111.

¹⁰⁷ *Ibid.*, p. 113, italics RG.

¹⁰⁸ *Ibid.*

¹⁰⁹ For Nietzsche’s influence on Geuss, see R. Geuss (1999) *Morality, Culture, and History: Essays on German Philosophy*, pp. 1-24, and 167-197. For Foucault, see Geuss, *Public Goods, Private Goods*, p. xvi.

¹¹⁰ *Ibid.*, p. xiv. See also: *ibid.*, p. x, italics RG: “Genealogy traces the history of its object back through a series of ramifying ancestors, *never* encountering a single, natural, original, absolute starting point.” Cf. M. Foucault (1982) “On the Genealogy of Ethics: An Overview of Work in Progress,” pp. 231-323. Henceforth: “Genealogy of Ethics.”

¹¹¹ Geuss, *Public Goods, Private Goods*, p. xi.

¹¹² *Ibid.*, p. xv.

¹¹³ Geuss, *Morality, Culture, and History*, pp. 22-23.

¹¹⁴ Geuss, *Public Goods, Private Goods*, pp. 192-193. Embracing a perspective, a culture or a certain view is, as Hannah Arendt put it, a subjective act of publicness. H. Arendt (1958) *The Human Condition*, pp. 22 and 57. Foucault cast such an act as constitutive of reality, an act of narration through which we constitute our own selves. Genealogy, he says, is “not to describe the indescribable, not to reveal the hidden, not to say the unsaid, but on the contrary, to collect the already-said, to reassemble that which one could hear or read, and this to an end which is nothing less than the constitution of the self.” Foucault in H.L. Dreyfuss and P. Rabinow (1982) *Michel Foucault: Beyond Structuralism and Hermeneutics*, p. 247.

¹¹⁵ Geuss, *Public Goods, Private Goods*, p. xiii.

¹¹⁶ “If metaphysics is overtly rejected either there must be complete scepticism as to knowledge of anything but personal sensations or else metaphysical beliefs will be covertly smuggled in to the purportedly metaphysics-free system. For ... we must make some assumptions that are not derived from experience.” J. Trusted (1991, 1994) *Physics and Metaphysics: Theories of Space and Time*, p. 179. I understand “experience” to signify empirical experience here.

¹¹⁷ Cf. E.A. Huppes-Cluysenaer (1995) *Waarneming en theorie: naar een nieuw formalisme in empirische en rechtswetenschap*, p. 222. Henceforth: *Waarneming en theorie*.

¹¹⁸ O.D. Duintjes (1988) *Rondom metafysica: over ‘transcendentie’ en de dubbelzinnigheid van de metafysica*, pp. 7-8, translation GD.

¹¹⁹ A. MacIntyre (2005) “Review of R. Geuss’s ‘Outside Ethics’.”

¹²⁰ Which is not the same as “empirical.” Empirical knowledge is knowledge of facts, entities based on certain external observations, which are the result of a controllable measuring procedure. See Huppes-Cluysenaer, *Waarneming en theorie*, p. 268.

¹²¹ Cf. M. Heidegger (1955) *What is Philosophy?*, p. 81, italics MH. “In astonishment we restrain ourselves (*être en arrêt*). We step back, as it were, from being, from the fact that it is as it is not otherwise. And astonishment is not used up in this retreating from the Being of being, but, as this retreating and self-restraining, it is at the same time forcibly drawn to and, as it were, held fast by that from which it retreats.” Ibid., p. 85.

¹²² See L. Zynda (1994) *Lectures on the Philosophy of Science*, Lectures 10 and 11.

¹²³ Cf. Gaus, *Contemporary Theories of Liberalism*, p. 12: “Equally well-informed scientists employing their reasoning in perfectly legitimate ways can arrive at different judgments about what is the preferred theory, and so about what is true.”

CHAPTER 3

Mind the Gap: Three Models of Democracy, and One Missing; Two Political Paradigms, and One Dwindling

3.1 Introduction

I have cast doubts on the domination of the publicity imperative in politics. Our contemporary understanding of politics leans heavily on dealing with the opposition between selfish and social preferences. I call this conception “politics as will formation.”

In this chapter I continue my argument against this idea of politics.¹²⁴ I will propose a different public/private distinction as the basis for developing a political theory: one between society and state. This distinction is the conceptual carrier of an alternative paradigm of political theory, which I call “politics as jurisdiction.” Taking this distinction as the starting point for theorizing politics does more justice to the inherent ambiguity of politics, which is dominated by the tension between civil freedom and public authority.

To bring my argument into perspective, I revisit an article by Jon Elster in which he provides a defense of deliberative democracy (section 3.2). Deliberative democracy results from answering two basic questions about politics, Elster argues: firstly, whether its process is to be defined as *private* or *public*, and secondly, whether its purpose is to be defined as *instrumental* or *intrinsic*. For Elster, these two questions result in three possible views of politics (or democracy). Deliberative democracy is one of them. I will complement Elster’s three models with a fourth one, which is diametrically opposed to the deliberative view of politics. I explain Elster’s omission by referring to his underlying paradigm of politics—politics as will formation (section 3.3). Informed by the moral idea of the publicity imperative, the paradigm of political will formation blocks Elster’s view to another approach to politics: politics as jurisdiction (section 3.4).

Arguing for politics as jurisdiction strongly improves the plausibility of the missing fourth model of democracy. Politics is not a moral discourse about public and private preferences, but about the ratio between governmental authority and civil liberty. To understand processes of will formation and the question of how to structure them is what politics as jurisdiction is about (section 3.5).

3.2 The “Market” or the “Forum”

In this section I will revisit two basic questions of political theory as posed by Jon Elster. First, what is the purpose of politics, and, second, how is its process to be defined? For Elster, these two questions result in three views of political theory that can be regarded as the dominant conceptions of political and democratic theory

today. Elster has given his influential exposition in the article “The Market and the Forum: Three Varieties of Political Theory” (1986), his aim being to give a critique of social-choice theory, or, in his words, the *market approach* to politics. The alternative he proposes is the *forum approach*, which is represented by two political theories: discourse (deliberative) theory and agonistic theory¹²⁵ (or: republicanism).

Elster calls social-choice theory a market approach to politics because it sees politics merely as a method for aggregating preferences in the interests of the common good.¹²⁶ Private preferences are coordinated according to a supply-and-demand mechanism, the typical example of which is the (secret) ballot, on the strength of which a political representative is chosen.¹²⁷ For this reason, Elster defines the object of social choice as “instrumental:” politics is a means to maximize the good and is essentially concerned with the optimum expression, aggregation, and distribution of private preferences. Moreover, social choice takes these preferences as a given, out of a respect for individual choice, which, it claims, is the central value of democracy. Elster therefore argues that social-choice theory defines the political process as “private.” Citizens’ preferences should be respected and not simply accepted conditionally. Hence, politics should merely be a translation of private preferences and must refrain from trying to influence them, since this would amount to paternalism.

In the tradition of nineteenth-century liberal revisionists such as T.H. Green and L.T. Hobhouse,¹²⁸ Elster firmly rejects the methodological individualism of social-choice theory.¹²⁹ To begin with, the assumption of given preferences “may not be a good guide as to what [people] really prefer,” and second, “what they really prefer may in any case offer a fragile foundation for social choice.” So it is not entirely clear, says Elster, “that the outcome of the social choice mechanism represents the common good, since there is a chance that everybody might prefer some other outcome.”¹³⁰ *Expressed* preferences often differ from *real* preferences; for instance, expressed preferences may be based on adaptive choices—i.e., on the feasibility of their success rather than on their desirability—or on strategic goals.¹³¹ Elster concludes that the social-choice model of politics lacks a conception of autonomous preferences; it needs a theory in which preferences are consciously formed, “not shaped by irrelevant processes.” Social-choice theory fails to take account of the normative dimension in will formation, since it does not take seriously the fundamental distinction between private preferences and public preferences, “between the kind of behaviour that is appropriate in the market place and that which is appropriate in the forum.”¹³² In the market place, egotistical behavior may be coped with and need not be problematic, but in the political forum it usually is. “[T]he task of politics is not only to eliminate inefficiency, but also to create justice—a goal to which the aggregation of prepolitical preferences is a quite incongruous means.”¹³³ The forum is the proper metaphor for politics, since

it shows that only norms that are the result of public deliberation can be called democratic. “The core of the theory, then, is that rather than aggregating or filtering preferences, the political system should be set up with a view to changing them by public debate and confrontation.”¹³⁴ The forum approach is taken seriously by the other two views of political theory: discursive (or deliberative) and agonistic (or republican) theory. According to Elster, these views “arise when one denies, first the *private character of political behaviour*, and then goes on also to deny the *instrumental nature of politics*.”¹³⁵ Politics is not an institutionalized mediation of private preferences, but a publicly concerted effort to bring about morally justified preferences. Both the agonistic and discursive views of politics take citizenship to be “a quality that can only be realized in public, i.e., in a collective joined for a common purpose.”¹³⁶

Elster’s analysis of the three models is renowned and has been widely followed in contemporary political theory. Jürgen Habermas and Seyla Benhabib speak respectively of “three normative models of democracy” and “three models of public space,” while Will Kymlicka employs a similar distinction between liberalism, communitarianism, and citizenship theory.¹³⁷ Like Elster, they take the market approach to politics as their main target and suggest the forum approach to be its only serious alternative.¹³⁸ Importantly, they take notice of but seek to renew “the republican tradition,” in which, as Habermas puts it, “the political public sphere acquires, along with its base in civil society, a strategic significance; it should secure the autonomy and integrating force of the citizens’ communicative practices.”¹³⁹ In this respect, the republican tradition diverges radically from social-choice theory, which has more affinity with the liberal tradition, in which the political public sphere is given less of a strategic or participatory function and more of a constitutional or juridical significance. The liberal focus is on the rightful degree of liberty and protection that citizens ought to have and to get from government.

This is precisely why the republican tradition is so critical of the liberal tradition: a mere juridical notion of politics ignores the political right to decide and deliberate democratically and runs the risk of silencing unwelcome views. As Benhabib puts it,

it is the very *process of unconstrained public dialogue* that will help us define the nature of the issues we are debating ... For it is only after the dialogue has opened in this radical fashion that we can be sure that we have come to agree upon a mutually acceptable definition of the problem rather than reaching some compromise consensus that will silence the concerns of some.¹⁴⁰

Preferences need to be exposed to public scrutiny *before* we can accept them as legitimate. In Carol Pateman’s famous words: “In the first place, it is only if the

individual has the opportunity directly to participate in decision-making... that he can hope to have any real control over the course of his life or the development of the environment in which he lives.”¹⁴¹

So, to Elster et al¹⁴² republicanism is not a fully satisfying answer to the liberal tradition; it needs to be modified. They see Hannah Arendt as its classic spokesperson. Arendt defended an *intrinsic* conception of politics, understood as a passionate statement against the decline of the public sphere and the “rise of the social.”¹⁴³ She intellectually anticipated the need to save politics from economic commodification and technocratization by introducing issues of the good life on a public level. According to Arendt, politics needed to be rejuvenated with a grand display of political virtues so that it would again function according to the spirit of ancient Greek politics.

Deliberative democrats have been criticizing republicanism for being so overambitious and naïve. They say that it overlooks the hazards of elitism and perfectionism. Put differently: in its definition of the political purpose, republicanism fails to make a proper distinction between the ethical and moral dimensions of democratic will formation. While it is true that politics must be based on publicly deliberated reasons, these reasons should not be seen as constituting a substantive will of the people. Instead, public reasons can only bind subjects if they are the result of a *higher* level of intersubjectivity embodied by a fair procedure that guides processes of democratic will formation. The binding force of deliberation is ultimately being exerted by the universal will to follow these procedures and to give public reasons in line with their conditions. The republican political process of deliberation, however, is fueled by particularistic cultures, and consequently becomes caught up in a public exercise and exposition of ethics. The unavoidable result is not consensus but an *agonistic* clash of interests and worldviews in which the only solution possible will necessarily be an undemocratic solution, as an intersubjective standard is absent. Elster blames republicanism, then, for defining “[t]he political process [as] an end in itself, a good or even the supreme good for those who participate in it.” This leads to a political process that is “narcissistic,”¹⁴⁴ because individuals or organization use politics to publicly advance their particular idea of the world. We have come across similar criticisms by Rawls.¹⁴⁵ According to Rawls, classical liberals such as J.S. Mill and Kant also relied on ethical, “comprehensive” doctrines as the moral basis for their political theories.¹⁴⁶ Like Elster, Rawls stresses that a political conception of justice cannot function as a substantive ethical theory due to the fact of pluralism. Only the *ideal* of the political conception itself is substantial. “A political conception is at best but a guiding framework of deliberation and reflection which helps us reach political agreement on at least the constitutional essentials and the basic questions of justice.”¹⁴⁷

To be sure, although deliberative democracy wants to avoid republicanism’s essentialist tendencies, it holds onto the ideal of using critical and public discussion to reach political agreement. But if public norms are to be valid and collectively

binding, they cannot be based on comprehensive (intrinsic) reasons but, instead, need to be procedurally legitimized.¹⁴⁸ We may conclude, therefore, that with regard to the political purpose, deliberative democracy *upholds* the very instrumentality of social-choice theory. Despite a different conception of the political process, deliberative democracy has the same conception of the political purpose. Although it fundamentally disagrees with social-choice theory about *how* to handle private preferences, it conflicts only in relative terms with *what* the process of politics should achieve. Regardless of whether politics is based in compromise (social choice) or consensus (deliberative democracy), it should ultimately be instrumental to the ideal of justice that is epitomized by the general notion of the public good. The purpose of politics is to serve society, not the other way around. Elster puts it like this:

Politics is concerned with substantive decision-making, and is to that extent instrumental. True, the idea of instrumental politics might also be taken in a more narrow sense, as implying that the political process is one in which individuals pursue their selfish interests, but more broadly understood it implies only that political action is primarily a means to a non-political end, and only secondarily, if at all, an end in itself.¹⁴⁹

Thus, as Elster makes clear, deliberative democracy upholds a broad rather than a narrow instrumentality; it rejects a narrow instrumentalist conception of politics as a means of mere private preference satisfaction but supports a conception of politics as broadly instrumental, because politics is subservient to its purpose. The main contrast between the deliberative and the social-choice models concerns their political *modus operandi*, not their political *telos*. Although Elster observes that there are many “technical and conceptual” problems with social-choice theory, its main problem lies in the assumption and acceptance of people’s given preferences.¹⁵⁰ He concludes that this is unacceptable because the essence of politics is its publicness: “[P]olitics must be an open and public activity....”¹⁵¹

Provided that we distinguish between broad and narrow instrumentality, we can summarize the three varieties of political theory set out by Elster as follows:

- (1) The social-choice view, according to which the political process is private and the political purpose is instrumental;
- (2) The discursive view, according to which the political process is public and the political purpose is instrumental;
- (3) The agonistic model, according to which the political process is public and the political purpose is intrinsic.

Elster states that republicanism *overexposes* politics. Its intrinsic view results in an inappropriate glorification of politics. We do not act politically for intrinsic (ethical)

but for instrumental (moral) reasons. On the other hand, social-choice theory *underexposes* politics. Its market view results in a neutralization of politics and makes political will formation immune to moral claims. Discursive political theory, in Elster’s view, has steered the right course—that of public instrumentalism, “defined as public in nature and instrumental in purpose.”¹⁵² According to Elster, a discursive politics publicly scrutinizes private preferences, yet upholds instrumentality through public will formation and decision-making.

But if we follow Elster’s analysis consistently and describe his three models with a diagram, we are confronted with a fourth view of political theory. As we can see in the figure, this new model, like discourse theory, also merges aspects of social-choice theory and agonistic theory, but highlights exactly the opposite characteristics: a private political process and an intrinsic political purpose. The question is, first, why Elster has neglected it, and second, what we would make of this model?

Figure 1: Jon Elster’s three varieties of political theory, plus a missing one

Purpose	Process	
	Private	Public
Instrumental	1. Social choice	2. Discursive
Intrinsic	4. ?	3. Agonistic

3.3 Politics as will formation

Elster has probably neglected the fourth model of politics due to his unconditional allegiance to the forum model of politics. After all, the main object of his article is to find a workable alternative to social choice’s *civic privatism*. And after having convincingly argued that the political process of will formation should indeed be defined as public, he moves on to characterize the political purpose, which amounts in his account to the encounter between discursive and agonistic theory (or deliberative democracy versus republicanism). Although the fourth model was clearly a theoretical possibility, the domination of the publicity imperative was again very effective: a political theory that portrays the process of democratic will formation as private becomes completely counterintuitive. For Elster, the “market or forum” issue has already been settled—the next issue being the definition of the purpose of the *public process of democratic will formation*, which leads to the well-known debate on the differences and the relationship between ideas of good and the principle of right.

Yet I believe that this debate amounts to barking up the wrong tree. Elster should have discussed the fourth model of political theory—and not so much for the sake of analytical consistency but because of the model’s normative significance. As I have already suggested, it makes a great deal of sense to portray processes of will formation as “private,” since the very democratic aspect of these processes lies in their independent (hence “private”) status *in relation* to public authority. And, what is more, the very object of these processes can be said to be intrinsic—not instrumental, as social-choice theory would have it. The purpose of deliberation and communication is not simply a means for moving toward the ideal of human progress and welfare, but that ideal’s very embodiment. Nevertheless, despite supporting an intrinsic conception of democratic will formation, the fourth model differs from the republican conception, for it constitutes a civil society instead of a political one.

In addition to this argument in favor of a fourth model of democratic will formation, it appears that there is a more far-reaching implication to consider. For if the fourth model of democracy puts the idea of *civil privatism* at the center of democracy, one might ask what the *public* aspect of democratic will formation is. I would like to show, however, that this is the wrong question, since it still assumes that political theory *is* about democratic will-formation processes in the first place. I believe, however, that an argument for depicting democratic will formation as private calls precisely for a reconsideration of that very approach to politics. Obviously, this reconsideration involves questioning the paradigm—which *precedes* Elster’s two questions of political theory—of politics as will formation. In particular, my line of questioning casts doubt on the political interpretation of the private/public distinction in terms of an opposition between the market and the forum.

As mentioned earlier, the main political issue for Elster is how people’s preferences should be dealt with democratically—that is, how the forum approach relates to the market approach in this respect. Elster states: “Politics, it is usually agreed, is concerned with the common good, and notably with the cases in which it cannot be realized as the aggregate outcome of individuals pursuing their private interests.”¹⁵³ I believe that this idea of politics is essentially why Elster dismisses potential alternatives to social choice, alternatives in which politics is also defined as private. If politics is defined in terms of will-formation processes, then surely it *is* difficult if not absurd to conceive of it as a collection of private wills. That would be almost a contradiction in terms, for the very rationale of—democratic—politics is its dependency on the public deliberation of citizens. We can therefore understand Elster’s decision to reject the fourth model *if* we accept his paradigm of politics as will formation. However, whether politics should be understood in this way is a question that needs to be examined first.

To restate there are two issues at stake here. First, what does the missing model of democratic will formation—the one defined as “private” and “intrinsic”—

look like? Second, what precisely is the central subject matter of political theory? I begin with the second of these issues. Only in Chapter 6 will I fully outline the fourth model of democratic will formation, by relating it to the political theory of Aristotle. I will call this fourth model “civil democracy.”

3.4 Politics as jurisdiction

As said, the main issue in Elster’s article is how we arrive at the public good—that is, whether processes of will formation should be relegated to the market mechanism or dealt with via deliberative forums. I see this as the wrong question, for it assumes politics to be primarily concerned with processes of will formation.

Instead of defining politics as a will-formation process, I define it as jurisdiction. Politics should be concerned with explaining, structuring, and justifying public authority, with the intention of achieving the right balance between, on the one hand, the desirability of an autonomous realm of civil practices and, on the other, the inevitability of the interventional authority of the state. In terms of Elster’s article, I would say that politics deals with the question of how *both* market and forum processes of will formation should be legally institutionalized—along with many other types of will formation. Politics as jurisdiction is the art of defining the foundation and limits of the state’s authority to govern and legislate *in relation* to these processes.

The obsession with seeing civic deliberation and public discussion as the nexus of politics has overshadowed the crucial political virtue of jurisdiction and, therefore, pushed aside the art of political institutionalization—that is, the authoritative organization of civil processes and practices of will formation. Politics is not the moral pinnacle of democratic will formation but, instead, is about the question of how public authority can protect but also intervene in these practices and processes of will formation.

Jurisdiction is the underpinning of politics, and I believe its relevance has grown rapidly. The very legitimacy of the democratic mandate of public authority is at stake. Debates about the viability of the European Union, the relation between religion and integration, and the status of the “war on terror” are all basically concerned with describing and circumscribing public authority in relation to societal processes of will formation. The problem in these cases is not so much a fragmentation of public justice but a fragmentation of public authority. The question that binds these debates is the jurisdiction of the political body—that is, the question of how public authority should execute its power to intervene.

Take the debate about the future of the European Union. What is the democratic issue at stake? It seems that many people find it difficult to understand what the Union *represents*, what mandate they have actually given their political leaders. Even pro-Europeans express skepticism about the legitimacy of the whole project. They accuse public authorities of incompetence and the unwillingness to

justify and explain their actions. The irony is that politicians themselves respond to these criticisms in terms of will formation, namely, on the one hand, by complaining about a lack of citizenship and by promising democratization in order to regain the trust of the voter, on the other hand. However, instead of wanting a greater say in matters of state and more political participation, the voter seems to prefer to have a greater insight into the jurisdiction of the Union, to know how the lines of its interventional authority are drawn in relation to their civil autonomy. The problem is how political authority represents itself in relation to its interventional power.

The “war on terror” is another example. Although many may agree about the great menace of international terrorism, there is concern and uncertainty about the potential “Big Brother” effects of countervailing measures by the state. People may not argue about the threat posed by terrorism, but they do disagree about the appropriate breadth and depth of the state’s interventions in the interests of public safety and about the implications such interventions may have for personal and private practices of will formation.

It could be argued that the great democratic problem is that public authorities themselves have a flawed sense of jurisdiction. They display an inability to explain either the responsibility that adheres to their being invested with public authority or the meaning of this responsibility in relation to the civil sovereignty of people’s practices. This incapacity could lead to a situation in which citizens no longer know why the state deserves their mandate, since they will have come to perceive laws more as obstructions than as accommodations to their life practices. This could mean that the very *raison d’être* of politics—i.e., the willingness to be subjected to public authority for the sake of civil sovereignty—may be disappearing.¹⁵⁴

Political jurisdiction depends on a different commitment than the deliberative commitment of confronting private preferences to public reason. The legitimacy of the political system does not depend on the result of democratic will formation, namely, a set of common norms. Instead, politics as jurisdiction is concerned with acquiring and holding the balance between, on the one hand, the *inevitability* of public authority, and the *desirability* of the autonomy of civil processes of will formation, on the other. According to a theory of politics as jurisdiction, democratic legitimacy is based on a political commitment that is embedded both in the preservation of the autonomy of civil practices and in the justification and explanation of state authority. This political theory is the practical effect of the idea of democratic self-organization: in order to be free, the people install a government that represents the state, and they accept its authority based on how it uses its mandate. Politics as jurisdiction is about balancing *both* aspects of the need for public authority and civil freedom.

The principal difference between these two features of a democratic system is well explained by Rousseau.¹⁵⁵ He distinguishes between two different “reciprocal commitments between society and the individual,” both belonging to what he calls

“the act of association.”¹⁵⁶ At the civil level, the individual associates “as a *member of the sovereign* in relation to individuals.”¹⁵⁷ Association is different at the political level, where the individual is “a *member of the state* in relation to the sovereign.”¹⁵⁸ Because he is co-constitutor of public law, he must be subjected to it as well, and since he cannot do this himself, the law needs to be enforced by a public authority: the state. To constitute a state, the individual has made an indissoluble pact and subjected himself to the general will. He renounces “that part of his power, his goods and his liberty which is the concern of the community....”¹⁵⁹ The social—or better: political—contract thus cannot be seen as a *result* of a democratic will-formation process, but only as an act in itself. To put it in analytical terms: the general will is the only plausible legitimation of public law. Precisely because popular sovereignty implies the equality of each person, no representational exception can be made at the political level. Rousseau stresses that at the political level it is thus vital that relations among subjects remain limited, since “[n]othing is more dangerous in public affairs than the influence of private interests....”¹⁶⁰ Public law can only rest on the full support of all.¹⁶¹ That is the democratic paradox: democratically organizing the body politic means accepting that “[s]overeignty cannot be represented for the same reason that it cannot be alienated; its essence is the general will, and cannot be represented—either it is the general will or it is something else; there is no intermediate possibility.”¹⁶²

Still, although theoretically the general will cannot be represented, from a practical point of view, of course, it must be.¹⁶³ And this is where politics as jurisdiction comes in: it is concerned with the practical—not original—representation of the general will by public authority. Hence, “democratic legitimacy” in this sense implies the explanation, delineation, and justification of the state in accordance with public law. Democratic legitimacy centers on the public discussion concerning the actions of the state in respect of its task of democratic representation. The sovereign has installed the state to provide for its freedom and can hold the state accountable for its actions accordingly. Democratic legitimacy implies, therefore, a delicate balance between freedom and authority.

Still, contra Hobbes and Locke, Rousseau makes clear that the acceptance of public authority never implies submission to it.¹⁶⁴ The principal idea of democracy rests on popular sovereignty represented by each subject’s will. As Rousseau writes: “Power may be delegated, but the will cannot be.”¹⁶⁵ What follows from Rousseau’s observation is the need to deal politically with an institutional framework of civil processes and practices of will formation. Democracy’s will formation aspect, which counterbalances the political representation of the general will, is the complement of politics as jurisdiction. Crucially, the political meaning of civil society is not its potential to create public reason but to flourish in its own terms, as a social web of institutions and practices of will formation. For, after all, this is why the sovereign has installed the body politic: to reach civil liberty.¹⁶⁶

The basic idea that informs the political public/private perspective and brings politics as jurisdiction into perspective is the distinction between state and society. In this respect, civil society is private, while its activities can be characterized as intrinsic. Civil society is a place for potential public support and consensus, but equally for public protest and dissent, which is part and parcel of democracy. For civil society's countervailing power is ultimately the very basis for limiting and influencing the state's practical representation of the general will. Indeed, politics as jurisdiction must be complemented by a *substantial* theory of democratic will formation, which I call "civil democracy" and will explain much more fully in Chapters 5 and 6. Without such a theory of will formation, surely, a conception of political jurisdiction would be void.¹⁶⁷

3.5 Politics as will formation versus politics as jurisdiction

According to the paradigm of politics as will formation, the legitimacy of politics is established through a continuous and communicative process of preference formation (or association in Rousseau's terms).¹⁶⁸ Politics is the intersubjective continuation of civil processes of will formation—namely, public deliberation based on fair procedural conditions. The will-formation paradigm thus observes no *essential* difference between the civil and the political levels of democracy. By contrast, politics as jurisdiction stresses the irreducibility of the civil and political levels. Both represent intrinsically different democratic processes and commitments. At the *political* level, the legitimacy of public authority is established through a controlling and preservative juridical structure. This task is much more complex than merely integrating deliberative rationality within the representational function of public authority. Jurisdiction implies the democratic legitimation of state authority, not an optimal incorporation of public will formation in political structures. Jurisdiction suggests a certain amount of autonomy on the part of public authority.

The irony is that a deliberative interpretation of public law will bring about the opposite of its initial goal: the weakening rather than the strengthening of popular sovereignty.¹⁶⁹ Because civil pluralism is conceptualized antagonistically, that is, characterized by private preferences that are fundamentally opposed and incommensurable, political will formation unavoidably acquires a strong transformative and integrative function. Its object is to reach consensus by exchanging and sharing public reasons for private preferences. The result is an unfortunate confusion of the civil and the political commitments.

More specifically, politics as will formation undermines both the *jurisdictional function* of the state and the *institutional autonomy* of civil processes of will formation. To start with the latter: according to politics as jurisdiction, a civil commitment is what invigorates democratic processes of will formation and, accordingly, the possibility of consensus. As I will set out in Chapters 6 and 7, especially following Aristotle, these processes can be characterized as intrinsically

triggered by a drive for happiness and a desire to lead a good life. In other words, civil society is characterized by what I call an *institutional plurality of pluriform practices*: a wide array of relatively self-sufficient institutions, which are determined by particular customs and rules.

The discursive response to republicanism is to respect civil self-sufficiency by rationalizing (and thus neutralizing) it within political procedures. Civil practices, however, should not be involved in political decision-making procedures in the first place. In this sense they need to remain private—or apolitical. Their very particularity can survive only in a situation of institutional autonomy, which is clearly demarcated by and from public authority. If not—that is, if processes of will formation are seen as conditional to political justice—civil commitments between individuals will be explained as political demands, and the result will be the public alienation of individuals. Alienation, however, should take place only at the political level, where individual citizens give a part of themselves to the community and where they implicitly mandate public authority to curtail will formation in order to protect it. Will formation itself should not be politicized as if a continuing social contract between citizens and the state is at stake and private wills are to be subjected to public association understood as transformation.¹⁷⁰

Furthermore, the jurisdictional function of the state will be undermined if it is based on moral assumptions of intersubjective rationality.¹⁷¹ Deliberative democrats oppose this; they see intersubjectivity as the core of political rationality, as necessary to abstract from social complexity in order to encourage *further* social integration.¹⁷² Although they emphasize a principled distinction between discursive and other forms of rationality, they unmistakably see will-formation processes *in the light of* the growth of discursive rationality. According to Habermas, the core of civil society is composed of associations that “institutionalize problem-solving discourses on questions of general interest within the framework of public spheres.”¹⁷³ These civil practices arrange the conditions for a communicative politics in which “social integration [is] accomplished by democratic means ... through a discursive filter.”¹⁷⁴ In other words, political will formation steps in where private will formation fails to be functionally integrative. Deliberative politics, Habermas continues, is a “reflexively organized learning process that *removes the burden* on latent processes or societal integration while *continuing* these processes within an action specialized for relief work.”¹⁷⁵ Anthony Laden adds that the ultimate justification of political principles is through the endorsement of “actual people acting politically in actual societies,” and this inevitably implies thinking of “the necessary preconditions for the possibility of reasonable political deliberation.”¹⁷⁶ The goal of politics as jurisdiction, on the other hand, is non-integrative. It locates the integrative component of democracy only *indirectly* in civil processes of will formation; politics itself has no integrative task. In this respect, it is important to distinguish between integrative discussions *within* associations that are concerned

with their *specific* interest, and discussions *between* associations in public spheres that are concerned with the *general* interest. The former type of discussion involves reflections about the idea of a good practice, such as running a hospital, or managing a warehouse, while public sphere discussions are more abstract. They deal with the question of how the many different processes, practices and institutions of will formation relate to each other—quite similar to the Platonic idea of dialectics.¹⁷⁷

It is important to note, however, that these kinds of discussions do not automatically imply the inclusion of a political aspect. There is no straight line from public spheres to politics. A discussion becomes political only when conceptions from public spheres get related to the task of jurisdiction. Jurisdiction is concerned with the matter of how public authority ought to structure the dynamics within private and public spheres of civil society, while keeping the initial pluralism as intact as possible. The political rationality that is appropriate here cannot be intersubjective, if intersubjectivity is understood as a public agreement of private wills. Politics as jurisdiction deals with the justified *intervention* and decision-making of the political body. While our civil commitment may be aimed at consensus, political commitment is necessarily directed towards compromise. After all, as citizens, we consider how governments may ensure that civil institutions and practices of will formation can coexist peacefully. And as such, the problem-solving capacity of civil associations or citizens cannot be regarded as ultimately preparatory for attaining political intersubjectivity. Civil harmony is fundamentally different from political harmony, and can be only indirectly effective for political peace and stability. Politics is not a continuous communicative forum in which private preferences are laundered and then selected following deliberation, after which they qualify for consensual legislation. Such a depiction of political rationality completely ignores what is necessary both to constitute the necessary legal institutional framework of a political community and to preserve its stability and endurance.

To illustrate this difference, let me touch upon the question of how politics as jurisdiction forms a political bond between an atheist and a believer, and how it stands out against deliberative democracy in this regard. First, at the civil level of democracy, the atheist expresses, explains, and defends his or her idea of goodness and truth, as does the believer. Each speaker might try to demonstrate how the other is deviating from rightness and aim to convert the other to the opposing view. If necessary or required, both speakers will explain their beliefs and hence compare them in public spheres—and they may harangue each other and argue fiercely. While they live in different private worlds, they will not forego arguments in favor of their beliefs in places where their worlds coincide or collide. And this is what democracy is about. Yet, at the political level, ideological conversion must be halted and disagreement pacified, for here it is necessary to construct a world where both the atheist and the believer can coexist. The deliberative impulse is to base the political constitution on an ongoing process of discourse in which the

believer and the atheist can come up with public reasons for their beliefs that both of them can understand and share. Under this commitment lies the *new* assumption that the believer and the atheist are also willing to *politically* question possible dogmatic aspects of their worldviews, which can result in the willingness to forego certain particular views of the good.¹⁷⁸ However, the political realm cannot live up to such great expectations.¹⁷⁹ A deliberative depiction of politics will not create the stable institutional context that the believer and the atheist need to pursue their ideas of a good life at the civil level. If these two citizens are expected to engage in discourse about their preferences, this time at the political level, the result will be an unwanted politicization, or smothering, of their preferences.¹⁸⁰ Politics as jurisdiction, by contrast, puts public consensus to one side, and concentrates on the juridical structure necessary for a peaceful *modus vivendi*. It explicitly reserves the ideal or possibility of consensus for the civil level, yet is at the same time conscious of the ideal's fragility. At the political level, therefore, the aim is to preserve and, if necessary, coercively safeguard the plurality of civil society. This cannot happen without the moderation of power relations embedded in civil processes and practices of will formation, which, as I have explained, puts a justification of the intervention of public authority at the center of politics.

3.6 Conclusion

In this chapter, I have introduced a different conception of politics. Against the deliberative idea of politics, which I have argued is a symptom of a political paradigm called "politics as will formation," I have proposed "politics as jurisdiction." Provided that politics is understood as jurisdiction, democratic will formation (or association) is private in its process and intrinsic in its purpose. I call this conception of will formation *civil democracy*. The adjective "civil" encompasses, first of all, the idea that will formation is fundamentally autonomous (private) in relation to public authority, and second, that will formation deals first and foremost with intrinsic conceptions of the good.

By analyzing the article by Jon Elster, I have shown how the publicity imperative does its work in political theory. It blocks out a conception of politics in which processes of will formation are seen as private. Indeed, proponents of social-choice theory do have a strong argument to make in respecting processes of will formation, but for the wrong reasons. Processes of will formation are private, but *not* because of a market lingo in which the political is seen as the instrumental facilitator for these privately depicted economic processes. Instead, it is greatly preferable to explain the private status of processes of will formation in terms of their relative independence. A private depiction of these processes reveals that politics is *not* their ultimate sanctifier. Politics itself does not fabricate good preferences and actions, but rather makes *laws* that secure and protect processes in which good actions can be cultivated. The democratic value of will-formation processes consists in their capacity to cultivate virtue.

Many contemporary commentators depict “publicness” as the epitome of politics. Politics should be democratic—that is, centered on the deliberation of people’s preferences. The political end is also said to be instrumental, for public deliberation should focus on social justice: it should create in society the conditions for fairness. The theory of deliberative democracy is seen as the ideal account of this view of politics. My aim in this chapter has been to introduce and stress the importance of a fourth model of democracy next to the familiar three, one called “civil democracy.” In its characteristics, civil democracy stands diametrically opposed to deliberative democracy, because it assumes a different paradigm of politics: politics as jurisdiction. Deliberative democracy fails to distinguish between the civil and the political level of democracy, and unfortunately understands politics as a combination of both: politics as public will formation.

(Notes)

¹²⁴ Much of this chapter is derived from Drosterij, “Mind the Gap.”

¹²⁵ The term “agonistic” is Elster’s. However, originally the adjective stems from Arendt. See Arendt, *Human Condition*, p. 41. See also M. Walzer (1983) *Spheres of Justice: A Defense of Pluralism and Equality*, p. 336, n. 31. Chantal Mouffe calls her position explicitly “agonist,” yet distinguishes her position from Arendt, who according to her is a Habermasian.

¹²⁶ See also B. Ackerman and J.S. Fishkin (2003) “Deliberation Day,” pp. 7 ff.; Habermas, *Facts and Norms*, p. 272: “In their choices at the polls, voters express their preferences. Their voting decisions have the same structure as the acts of choice made by market participants.” See also W. Kymlicka (2002) *Contemporary Political Philosophy: An Introduction*, pp. 287–295. Henceforth: *Contemporary Political Philosophy*.

¹²⁷ “The democratic method is that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will.” J. Schumpeter ([1943], 1987) *Capitalism, Socialism and Democracy*, p. 250.

¹²⁸ See S. Collini (1976) “Hobhouse, Bosanquet and the State: Philosophical Idealism and Political Argument in England 1880–1918.” See also J. Morrow (1984) “Liberalism and British Idealist Political Philosophy: A Reassessment.”

¹²⁹ Cf. R. Goodin (1986) “Laundering Preferences.”

¹³⁰ For all three quotes: J. Elster ([1986], 1997) “The Market and the Forum: Three Varieties of Political Theory,” pp. 7–8. Henceforth: “Market and Forum.”

¹³¹ Elster relates this thought to his famous “sour grapes” example. The explanation that someone does not mind *not* eating the grapes because they are sour might just as well be inverted: the person’s reason for believing the grapes to be sour was the fact that she was not *able* to eat the grapes. In such a case, real preferences are being shut out by adaptive preferences.

¹³² Ibid., p. 10, cf. J. Habermas (1996) "Three Normative Models of Democracy," p. 23.

¹³³ Elster, "Market and Forum," pp. 10-11.

¹³⁴ Ibid., p. 11. See also e.g. Laden, *Reasonable Radical*, p. 74.

¹³⁵ Elster, "Market and Forum," p. 3, italics JE, cf. Habermas, *Facts and Norms*, p. 269.

¹³⁶ Elster, "Market and Forum," p. 26, cf. Habermas, *Facts and Norms*, p. 269.

¹³⁷ Habermas, "Three Normative Models of Democracy," p. 21. See also Habermas, *Facts and Norms*, pp. 336 ff. Benhabib, "Models of Public Space," Kymlicka, *Contemporary Political Philosophy*, pp. 284-285. Cf. Gutmann and Thompson, *Democracy and Disagreement*, pp. 26 ff. who distinguish between deliberative, proceduralist (liberal) and constitutionalist (republican) democracy. They affirm that this distinction resembles Habermas's (ibid., p. 368, nt. 34).

¹³⁸ Cf. D. Miller (2003) "Deliberative Democracy and Social Choice," p. 182.

¹³⁹ Habermas, *Facts and Norms*, p. 269, cf. ibid., p. 336.

¹⁴⁰ Benhabib, "Models of Public Space," pp. 82-83, italics SB.

¹⁴¹ C. Pateman (1986) *Participation and Democratic Theory*, p. 110.

¹⁴² Benhabib, "Models of Public Space." Habermas, "Three Normative Models of Democracy," p. 24, and Habermas, *Facts and Norms*, pp. 295-302; Kymlicka, *Contemporary Political Philosophy*, pp. 299-302. See also: J. Bohman ([1996], 2000) *Public Deliberation: Pluralism, Complexity, and Democracy*, pp. 237-238, and Rawls, *Justice as Fairness*, pp. 142-144.

¹⁴³ That is, the realm through which "the life process itself ... in one form or another has been channeled into the public sphere." *Human Condition*, p. 45. Arendt's basic critique of modern politics was its degeneration into an instrumental human activity. According to her, the substantive meaning of politics already was lost in the Latin translation of *zoon politikon* with *animalis socialis*: "it indicated an alliance between people for a specific purpose, as when men organize in order to rule others or to commit a crime." Ibid., p. 23.

¹⁴⁴ Both quotes: Elster, "Market and Forum," p. 26.

¹⁴⁵ E.g. Rawls, *Political Liberalism*, pp. xlv-xlv, and 199 ff. To be sure, Benhabib ("Models of Public Space," p. 105) sees Bruce Ackerman and John Rawls as two proponents of the liberal model. Leaving Ackerman aside, it is questionable to consider Rawls's political liberalism as fundamentally distinct from deliberative political theory (read: Habermas), as Benhabib does.

¹⁴⁶ For Mill see e.g. J.S. Mill ([1861], 1987) *Considerations on Representative Government*, Chapter 10 (henceforth: *Considerations*); Mill, *On Liberty*, pp. 9-10.

¹⁴⁷ Rawls, *Political Liberalism*, p. 156.

¹⁴⁸ Habermas, *Facts and Norms*, pp. 307, 339.

¹⁴⁹ Elster, "Market and Forum," p. 19.

¹⁵⁰ Ibid., p. 7.

¹⁵¹ Ibid., p. 11.

¹⁵² Ibid., p. 26.

¹⁵³ Elster, "Market and Forum," p. 4. Cf. Rawls's distinction between the "rational" and

the “reasonable,” in which the reasonable sets just terms and fair rules for rationally acting persons in a society. Rawls, *Justice as Fairness*, pp. 6-7.

¹⁵⁴ Recently, two reports were published with similar criticism: Raad van State (2008) *Jaarverslag 2007*, and Nationale Ombudsman (2008) *Burgerschap verzilverd: Verslag van de Nationale ombudsman over 2007*.

¹⁵⁵ Rousseau, *Social Contract*, pp. 62, 98-99. See also I. Kant ([1797], 1998) *The Metaphysics of Morals*, §43, p. 89, italics IK (henceforth: *Metaphysics of Morals*). “This condition of the individuals within a people in relation to one another is called a *civil* condition (*status civilis*), and the whole of individuals in a rightful condition, in relation to its own members is called a *state* (*civitas*).”

¹⁵⁶ Rousseau, *Social Contract*, p. 62.

¹⁵⁷ This civil association has two sides, however: on the one hand, the individual is part of the sovereign, equal member of the body of citizens that forms the general will and constitutes the state. On the other hand, however, the individual is a free subject who is endowed with a particular will and private preferences.

¹⁵⁸ Both quotes: Rousseau, *Social Contract*, p. 62, italics GD.

¹⁵⁹ *Ibid.*, p. 74.

¹⁶⁰ *Ibid.*, p. 112

¹⁶¹ P. Scholten ([1931], 1974) *Mr. C. Asser's Handleiding tot de beoefening van het Nederlandse recht: algemeen deel*, p. 28. Henceforth: *Handleiding*.

¹⁶² Rousseau, *Social Contract*, Book III, Chapter 15, p. 141. Obviously, the influence of Rousseau on Kant's categorical imperative is significant. See also Chapter 7. See also on the democratic paradox: B. Honig (2007) “Between Decision and Deliberation: Political Paradox in Democratic Theory.” Henceforth: “Between Decision and Deliberation.”

¹⁶³ Cf. I. Kant ([1795], 1999) “Perpetual Peace: A Philosophical Sketch,” p. 101, italics IK. “For any government which is not *representative* is essentially an *anomaly*, because one and the same person cannot at the same time be both the legislator and the executor of his own will” Therefore, Kant says (following Rousseau), in the “truest sense of the word” democracy is a despotic system, since all citizens are executive, except the ruler.

¹⁶⁴ See more on this: section 7.2.

¹⁶⁵ Rousseau, *Social Contract*, Book II, Chapter 2, p. 69.

¹⁶⁶ This could be said to be the great divide between republicans and liberals: the question being whether civil practices are seen as *avored and permitted* by public authorities, or whether they are *acknowledged and respected* as such. See also Scholten, *Handleiding*, pp. 15-16.

¹⁶⁷ Cf. *ibid.*, p. 29.

¹⁶⁸ “Deliberative democracy expresses a dynamic conception of politics.” A. Gutmann and D. Thompson (1999) “Reply to Critics,” p. 276. Anthony Laden says: “[T]o accommodate diversity properly is [to rest] the claim of legitimacy not on the nature of the agreement reached, but rather in the fact of its *continued reaffirmation through ongoing reasonable political deliberation*.” Laden, *Reasonably Radical*, p. 126, italics GD. Cf. W.

Witteveen (2006) "Democratie en het retorische waarheidsstreven," p. 80.

¹⁶⁹ Schumpeter would have been an enemy of deliberative democracy. He claims that it is naïve to give public deliberation the trump status of improving the political process, because it is extremely vulnerable to manipulation. In contrast, private people are more capable to effectively raise their voice: "The picture of the prettiest girl that ever lived will in the long run prove powerless to maintain the sales of a bad cigarette. There is no equally effective safeguard in the case of political decisions." Schumpeter, *Capitalism, Socialism and Democracy*, p. 263.

¹⁷⁰ Of course, this is not to imply that no deliberative structures can or should be part of the political representational system.

¹⁷¹ In the next chapter I will argue that political theory is intersubjective but only on a *symbolical*, not rational, level.

¹⁷² Habermas, *Facts and Norms*, pp. 324-325.

¹⁷³ *Ibid.*, p. 367.

¹⁷⁴ *Ibid.*, p. 318.

¹⁷⁵ *Ibid.*, p. 321, italics JH.

¹⁷⁶ Laden, *Reasonably Radical*, pp. 16-17.

¹⁷⁷ Plato, *Republic*, pp. 531 ff.

¹⁷⁸ See e.g. Habermas, *Facts and Norms*, pp. 324-325.

¹⁷⁹ "For indeed while it is not impossible for a private will to coincide with the general will on some other point or other, it is impossible for such a coincidence to be regular and enduring; for the private will inclines by its very nature towards partiality, and the general will to equality." Rousseau, *Social Contract*, p. 69.

¹⁸⁰ "[E]xperience shows that only a small minority of the population wish to participate in this way [that is, directly in decision-making]... the majority prefer to lead a full family life and cultivate their gardens. And a good thing too. For if we believe in socialism as a means of increasing personal freedom and the range of choice, we do not necessarily want a busy, bustling society in which everyone is politically active, and fussing around in an interfering and responsible manner, and herding us all into participating groups. The threat to privacy and freedom would be intolerable." A. Crosland cited in: C. Pollit (2003) *The Essential Public Manager*, p. 102.

CHAPTER 4

The Distinctiveness of Politics: Political Theory as a Third-Order Construction

4.1 Introduction

In Chapter 3, I introduced a concept of politics as jurisdiction as an alternative to politics as will formation. At bottom lies a different political public/private conception, namely the distinction between society and state. Understanding the phenomenon of politics as facilitating civil liberty on the one hand and maintaining public authority on the other keeps one away from making politics into a moral competition between interests and preferences. In this chapter, I will make an analogous argument, but from an epistemological point of view. I will be asking what the scientific status of theorizing politics is. Because political theory studies how practices of will formation or association need to be ordered (jurisdiction), we will need to consider the epistemology of such processes. This consideration will require us to understand how such practices are socially constructed and can be conceptualized in terms of political theory.

The chapter is structured as follows. First, I describe three postulates of political theory that often return in the literature: the practical, social constructivist, and intersubjective elements of political theory (section 4.2). I critically analyze these postulates in the light of a key epistemological issue, called the “epistemic problem.” This move will lead into a classification of social constructions and a critique of the pragmatist conception of political theory (section 4.3). Finally, I will revisit the three postulates of political theory (section 4.4).

4.2 Three postulates of political theory

This section is a report on some widespread assumptions about the scientific basics of political theory. This is not to imply that there are certain authors who share all of these postulates, but that there are many authors who are to a considerable extent influenced by them. Three postulates of political theory frequently pop up in the political-theoretical debate, so it is important to clarify them.

4.2.1 Postulate 1: Political theory is practical, not metaphysical

Ever since John Rawls forcefully defended the importance of non-metaphysical thinking in political theory, many political theorists have redefined their object of study accordingly.¹⁸¹ Contrary to what I defended in Chapter 2, these scholars oppose political metaphysics¹⁸² and instead underscore William James’s adage that theories should be “*instruments, not answers to enigmas, in which we can rest.*”¹⁸³ The resoluteness to reject the suitability, desirability, or even the possibility of political

metaphysics is prevalent, even though—at least in my opinion—most insights from political philosophy are highly abstract and, on the whole, selective generalizations of innumerable relations between phenomena. To understand political philosophy as metaphysical is nevertheless characterized as old-fashioned and sometimes even as dangerous. According to Rawls, “a continuing shared understanding of one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power. ... [T]he Inquisition was not an accident; its suppression of heresy was needed to preserve that shared religious belief.”¹⁸⁴

But if political metaphysics is rejected, what alternative standards do define the quality of political theory? The common answer—also in Rawls’s by now classic words—is that political theory should be *political*,¹⁸⁵ that is, it should solve social problems in a political fashion, which means through publicly justifiable principles that settle conflicts between (groups of) people. Jon Elster called this “broad instrumentality,” a term that emphasizes that the purpose of political theory is to provide society with a neutral deliberative procedure in order to solve political conflicts fairly. And as Habermas explains, the fairness of such a deliberative procedure “resides in the rules of discourse and forms of argumentation that borrow from the validity basis of action oriented to reaching understanding. In the final analysis, this normative content arises from the structure of linguistic communication and the communicative mode of sociation.”¹⁸⁶ In other words, the practical use of political theory is to theorize modes of intersubjective communication based on modes of association in order to engage with political conflicts.

Comprehensive moralism has to be avoided, it is said, however, due to what Rawls calls “the fact of pluralism.”¹⁸⁷ People have diverse ideas of the good, which makes it impossible to construct a reasonable public conception of political justice based on a conception of the good.¹⁸⁸ Political theory has to respect ethical diversity and stick to “a political conception of society, which is based on some fundamental ideas embedded in “the public political culture of a democratic society.”¹⁸⁹ Political neutralism is secured if these fundamental ideas are made explicit in reasonable political conditions and procedures, which ought to guarantee a just and cooperative result for all parties within a political society.¹⁹⁰

Gerald Gaus agrees with Rawls about the importance of de-essentializing political theory. The central mission of political theory, in Gaus’s conception, is to obtain a publicly justified conception of politico-legal norms.¹⁹¹ The relation between justified beliefs and thoughts about the world itself is a different thing, according to Gaus. What matters is the reasonability of the political rules that constitute practices. Political theorists should therefore concentrate on the epistemological justification of people’s beliefs—that is, on the question of *how* these beliefs can be publicly justified and, in the end, how they can serve as the basis for political rules.¹⁹² Only after testing their “reasonability” can their political feasibility be ascertained.¹⁹³ Gaus states: “because there is no such thing as an uncontentious

theory of justification, an adequately articulated liberalism must clarify and defend its conception of justified belief—its epistemology.”¹⁹⁴ In this respect, it is clear that the term “publicly justified metaphysics” is a contradiction—like its mirror image, “private politics”—since, in a deeply plural society, a particular metaphysical conception will never be shared by all.

Not metaphysics but epistemology, then, is what is needed. To illustrate how a political theory can be epistemologically successful, Gaus uses the metaphor of a map. A map should help the user to make sense of the world by simply and consistently showing the landscape and making possible a route from A to B.¹⁹⁵ The construction underlying the map can be called “successful” insofar as it fulfills these functions well.¹⁹⁶ Similarly, to produce a useful theory, one must find concepts that are suited for successful practical action (and communication).¹⁹⁷ Theory serves the case at hand and is judged according to its usefulness, after which social expectations can be justifiably established—and ultimately institutionalized.¹⁹⁸ Gaus wants theory to guide and clarify human action, and this should be the object of political theory as well—to offer practical help by “navigating us around the political world.”¹⁹⁹ Because political theory should serve as a kind of map for all people, its standard of success needs to be publicly justified. Political theory has to meet two conditions simultaneously: that of functioning well and that of being publicly reasonable.

4.2.2 Postulate 2: Political theory is social constructivist

Many scholars have taken seriously Ludwig Wittgenstein’s criticism of observational language—that theories do not represent the world in a straightforward way.²⁰⁰ Theories cannot be empirically fixed and are therefore subject to a plurality of interpretations. Indeed, according to Wittgenstein, language in general cannot be understood independently from the practices in which it is being uttered. Theories are the socially constructed products of practices and this means that without prior knowledge of a particular practice, it is difficult to understand the language that is internal to the practice.²⁰¹ Social constructivism suggests, then, that political theory cannot be straightforwardly distinguished from theory in general, because it does not have an exclusive role in constructing practices—all theory does that.²⁰²

The social construction of reality makes reality artificial, in a sense; and since reality can be said to be a human construct, it cannot be taken for granted. Among social theorists, Langdon Winner has been an influential proponent of the idea that theorizing has built-in political characteristics due to its social-constructivist nature. Winner has given some eye-catching examples that illustrate how science designs the world through technologies. These technologies can be called “political,” Winner claims, because they influence human action by empowering or limiting it.

Many technical devices and systems important in everyday life contain possibilities for many different ways of ordering human activity.

Consciously or unconsciously, deliberately or inadvertently, societies choose structures for technologies that influence how people are going to work, communicate, travel, consume, and so forth over a very long time. ... In that sense technological innovations are similar to *legislative acts or political foundings* that establish a framework for public order that will endure over many generations.²⁰³

Illustrating the non-neutral, or political, character of technological designs, Winner refers to Baron Haussmann's Parisian boulevards and Robert Moses's motorway crossings in New York. According to Winner, these designs were political designs, because they influenced practices by arranging and conditioning human behavior.²⁰⁴ Winner thinks that the social influence of technologies, architectural designs, or artifacts underscores the need to develop a sense of *democratic responsibility* towards their design and construction. Political theory's object, Winner insists, should be to put the value-embeddedness of technological practices into *normative* perspective and to redress their inherent or effective injustices. Implicit social constructions should be made politically explicit and subject to public discussion. The complementing hope is that people will develop an ethical sensibility in dealing with them.

With this solution, Winner pays tribute to Dewey's suggestions of conceptual reconstruction, namely, that "[p]olitical concepts must be tested and continually revised on the ground of the consequences they produce in existential application."²⁰⁵ To understand a theory or conjecture, we must be connected to the practical phenomena that are its object. Gaus emphasizes that "language is part of living; to understand the words of that language one must understand the ways of living of which that language is a part."²⁰⁶ Giving meaning to words and denoting things in reality are learned in "practices" because that is where those words are actually being used and constructed. Likewise, political theory is science in action²⁰⁷: the meaning of political concepts cannot be distinguished from what they produce. Here Postulate 1 meets Postulate 2—and leads to Postulate 3: the meaning of a political construction should be established by its practical effect, which can only be done by bringing in the participants, who discuss their use of the political construction in practice.

4.2.3 Postulate 3: Political theory is intersubjectivist

The third postulate of political theory is closely related to both the first and the second. Since the public participates in political practices, the value of political rules needs to be intersubjectively constituted as well. Making sense of the world, generally speaking, takes place in a process of intersubjective communication. As Peter Winch puts it: "Establishing a standard is not an activity which it makes sense to ascribe to any individual in complete isolation from other individuals.

For it is contact with other individuals which alone makes possible the external check on one's actions which is inseparable from an established standard."²⁰⁸ A practice is constituted intersubjectively because giving meaning is necessarily an interactive process. Participants incessantly exchange meaning by implicitly relating certain concepts and rules to what actually happens in practice. Through this back-and-forth process, they understand a certain joke, gesture, or saying.²⁰⁹ Language is participatory: it can only be learned by the public exchange of meaning in practice.²¹⁰

Rawls, however, stresses that, without the standard or the rule, people would not be able to understand each other in the first place. A standard is a vital condition of communication. Rawls illustrates this with reference to the game of baseball: "No matter what a person did, what he did would not be described as stealing a base or striking out or drawing a walk unless he could also be described as playing baseball, and for him to be doing this presupposes the rule-like practice which constitutes the game."²¹¹ Without the institutionalized set of rules that make up the game of baseball, the activity of suddenly running from one cushion to another could not be identified as "stealing a base."²¹² Hence, Rawls stresses that practical communication can only be an intersubjective process *if* participants discursively exchange their experiences with reference to the rules that constitute the practice. Moreover, I would add, although there is no independent way of establishing meaning in a practice, there always will be some sort of qualification regarding the participants that are involved in changing the rules. Depending on size and activity of the particular practice, the degree of intersubjectivity in a practice is always limited: a community of beekeepers is not particularly qualified to discuss the rules of baseball, and vice versa.

The epistemology of intersubjective communication seems to reinforce Winner's call for democratization. If social constructions can be called "political" because they influence participants of a practice, they ought to be open for discussion. This call for discussion has a special significance for *political theory*, because in politics the beekeeper argument fails: we are *all* legitimate participants. A political practice's public is inclusive, its standards the concern of the public at large. Hence, political theory needs to take notice of politics' *inherent democraticness*: every member of the public has a right to contribute to the functioning of a political community.²¹³

The importance of publicly deliberating preferences is the consequence of applying an intersubjective epistemology to political theory: they mutually reinforce each other. Recall Larry Lessig's description of politics as "the process by which we reason"²¹⁴: it is both a democratic right and a collective responsibility to deliberate about influential social, economic, and technological developments. Political theory is democratized science in its purest form because in the polis we all are legitimate stakeholders.²¹⁵

The three postulates of political theory can be summarized as follows:

- (1) Political theory needs to be publicly practical, not metaphysical; it is justified if it brings solutions to political problems;
- (2) Political theory is not a representation but a social construction of reality; like all theory, political theory is thus political, because by constructing reality it has practical consequences;
- (3) Political theory needs to take into account that practices are constituted intersubjectively, which brings an extra pressure to political theory because the moral stakeholder of the political practice can be said to be the public at large.²¹⁶

Incorporating the above postulates, political theory may be defined as the study of publicly justified social constructions that solve political problems. Democratic discussion not only clarifies and explicates the social construction of the world but also provides the solutions to the problems that are created by it. Political theory searches for ways to reasonably construct political solutions. We may call this pragmatist political theory, since elements of non-essentialism, practicality, and social constructivism are central to it.

Do these three postulates fulfill the quest for an adequate epistemological characterization of political theory? For a beginning of an answer it is helpful to return to Winner's observation about political technologies. According to Winner, social constructions are value-embedded and influence human action; hence, they can be called "political." The right response is to subject them to democratic discussion in order to make sure that they do not illegitimately obstruct certain practices. It remains unclear, however, what the special significance of political theory is according to this conception. Given the social-constructivist point about the inherent political effect of language, we need to clarify the contention that political theory should study how to democratically deal with social constructions.²¹⁷ What exactly is so political about making things public and discussing them? In line with the general point concerning politics as will formation, it seems to be only relatively different—not qualitatively—from critical activities in journalism or literature.²¹⁸ In these domains people also take the trouble to scrutinize the powerful effects of architectures, policies, artifacts, or ideologies. Is democratic deliberation enough to tackle the negative implications of the socially constructed world? The political question involved seems to be more complex.

4.3 Deconstructing social constructions

In considering the adequacy of the plea for publicly discussing social constructions, it is important to find out what the epistemological status of a social construction is. If politics is said to be concerned with the public discussion of social constructions,

we need consider what these constructions actually refer to and what the constructed object of discussion is. With these criteria in mind, we can turn to consider the very *possibility* of relating a construction to its functioning in a practice.

4.3.1 The difficulty of defining a construction

According to pragmatism, the meaning of a construction (a linguistic translation of reality) is tied to its *function*—that is, how the construction is used in a practice. The definition of a construction depends on the definition of the construction's practical success. This, however, suggests a communicative structure, in which thoughts and experiences about the practice are exchanged and understood. In order for such a process to be effective, *tacit* understandings of the quality or function of the practice need to be made *explicit*; they need to be translated into a common vocabulary in order to assess the practical success of the theory.²¹⁹

But making meaning explicit is more easily said than done. Although in daily life people usually interact in fluid ways, this does not imply that they understand each other all the time. All sorts of are happening in a practice in which participants give meaning and communicate. Defining such a practice would imply assessing, at the very least, its physical context (e.g., place, time, weather, objects) and the way participants are attuning to it²²⁰—how they are coping with each other and how they are integrating their own psychological state (e.g., their feelings, habits, experiences, tacit knowledge). Any discursive explication of a practice that is observed from such a perspective will inevitably be a selective rationalization. Language cannot represent such dense context and endless dynamics, neither quantitatively nor qualitatively. How participants actually function and interact is in constant flux, a dynamic state that theory—artificial and abstract—cannot capture. There is an immense difference between the particular reality to which a theory refers and the description the theory offers of it. This limitation has important consequences for the attempt to account defining a theory itself—not least for a *political* theory.

The difference between the practical and theoretical status of a construction can be exemplified by Gaus's example of the map. If users of a map want to *come to an agreement* about the map's functional success, they must be able to discursively explicate their understanding of its function. Participants—a group of people traveling by car, perhaps—need to agree that it was specifically the guiding function of the map that led them to their destination, and their definition of this guiding function must be mutually understood. These criteria are not unproblematic: *discursively* sharing the function of a practice (as a way to agree about the meaning of a construction) is different in principle from *actually* sharing the function in concrete experience. A definition of practical success, then, often remains ambiguous; it relies not only on the selection of some aspects of reality over others, but on the translation of these experiences into descriptive terms, as well. If the travelers need to agree on the meaning of the map, there might be differences

of opinion when linking its general meaning (finding a location) to the meaning of the larger practice (traveling). Was it, during this particular occasion, the map that led the travelers to their destination, or was it pure luck, acquaintance with the itinerary, or the intuitive driving skills of the chauffeur? If the travelers consider the specific map in the car to be the principal cause that led them to their destination, their choice would represent only a selective rationalization of the practice. The actual experience of the practice (jointly traveling by car) is too intricate to connect it *straightforwardly* to the directional success of the map. The point to make is that although words or constructions are generally *understood* through their function in a practice (a map is understood to show you the direction from A to B), this does not imply that their theoretical meaning can be simply connected to a specific practice. Defining the theoretical meaning of a term by directly linking it to the practice in which it is used inevitably leaves a translation gap that cannot be filled.

4.3.2 Orders of construction and the epistemic problem

Drawing attention to the principal difference between understanding constructions by their practical application and by their theoretical meaning, Liesbeth Huppess-Cluysenaer has argued for a distinction between first-order and second-order epistemological constructions.²²¹ A first-order construction is a tacit, or natural, form of knowledge, while a second-order construction is a scientific, or theoretical, form of knowledge. There is a great difference between them. “Natural language,” Huppess-Cluysenaer writes, “relates to the way people use language in face-to-face contact. . . . Scientific language, however, is the attempt to give words an independent, context-free definition. . . .”²²² In a first-order construction, meaning is implicit, fluid and informal, and although communication at this level is not explicitly defined, by and large it is usually sufficient for effective communication. A second-order construction, however, *defines* the very terms of first-order constructions, the terms through which the constructions obtain an objective and institutional status. Although communication at a second-order level certainly takes into account the dynamics of first-order constructions—that is, the communicative particularities of the practices under consideration—the *actual* meanings of first-order constructions are lost in translation at this abstracted level. In daily communication (e.g., in schools, concert halls, kitchens, restaurants) the understanding of, say, “a glass of water” is generally successful, despite the many different contexts in which a glass of water appears. People will understand what I mean if I speak of that glass of water on the table. They know for instance—or perhaps better: expect²²³—that drinking from it quenches thirst. Such tacit knowledge of the water glass’s practical meaning is sufficient in many circumstances. It becomes a different story if the very object in question needs to be defined: giving a theoretical definition of a “glass of water” (or “quenching one’s thirst”) is a difficult thing—most people will not be able to do it—and only has a vague connection with the context in which it is used.

Although second-order constructions are induced by particular experiences

of a practice, they have an independent status in regard to these experiences. A professional athlete's exercise regime, for instance, is a translation and interpretation — a construction — of many specific exercises. Its status is theoretical and normative by bringing first-order exercising dynamics into perspective. However, it cannot be a direct empirical reflection of the athlete's training activities, not only because it is necessarily interpretive, but also because it is exclusive of the many aspects of exercise that are difficult to capture in words. Put differently, despite its fluidity and fluency, a first-order construction is already a translation of a situation. It is therefore necessary to further distinguish between a first-order construction and a *zero-order* construction. A daily practice, for instance, a training at a soccer field, is a social construction, since its point of reference — the particularity and immediacy of the situation as experienced by the participants — cannot be straightforwardly communicated. This becomes apparent when a certain aspect of the training is described or discussed, such as the interaction between defender and goal keeper after an unnecessary goal. Such an interaction might appear to be natural, yet it is in fact a communicative interpretation and interaction of their individual states. The participants will have different personal ideas and feelings about it, since many of their initial experiences were different. Interestingly, the moment when there is an argument, or some other friction, these semantic gaps will appear, and the participants might move to a second-order level where they will try to define and explain the situation more explicitly. At this level, differences of opinion concerning a specific situation will include zero-order constructions. The particular experiences of the participants (experiences I called “metaphysical” in Chapter 2) lie “beneath” the first-order dynamics of communication. These sensations are intuitive and non-linguistic; they precede conceptualization and cannot be described without losing their particularity.²²⁴ This awareness — that thoughts and words cannot replicate the particularity of a situation — is what Huppes-Cluysenaer calls “the epistemic problem” [*het kenprobleem*], which she describes as follows: “The individuality of things has a separate existence outside the mind. A problem arises from the impossibility to describe this individuality.”²²⁵ Huppes-Cluysenaer makes clear that there is a fundamental difference between experiencing and describing the world: its particularity, diversity and richness cannot be copied.²²⁶ Any (re)construction of the world needs to take language's epistemic limit into account, its reduction of reality.

To sum up, three orders of construction (or levels of knowledge) can be distinguished in a given practice: non-linguistic knowledge of the practice (zero-order), natural knowledge of the practice (first-order), and theoretical knowledge of the practice (second-order). The differences between the orders are absolute, not gradual. In the movement from one level to another, something is lost and something else takes its place: from “zero” to “one,” situational particularity transforms into informal communication; from “one” to “two,” informal communication changes into theoretical communication.

4.3.3 *The pragmatic approach to social constructions*

Pragmatist epistemology, which is based on a dynamic and informal conception of communication, leads to the integration of non-linguistic and theoretical aspects of knowledge. In pragmatism, non-linguistic knowledge becomes part of the discussion only if it is rationalized, while the success of theoretical knowledge can only be ascertained by practical application at a first-order level of informal communication.

According to pragmatism, theory is a consequence of human action, hence always subject to change. Theory is “passing,” as Donald Davidson renders it, its status under construction and ready for adjustment in accordance with a changing world.²²⁷ Second-order constructions, in other words, are temporary recordings of successful human functioning, and therefore they should not be conceptually separated from first-order constructions. Their success depends on their functionality, and, paraphrasing Rorty, it hardly matters how the trick is done if the results are satisfactory.²²⁸ To pragmatism, language in general is contingent, because, as Davidson writes, there is no real distinction between “knowing a language and knowing our way around the world generally. For there are no rules for arriving at passing theories that work.”²²⁹ We need to try out theories, hypotheses, and thoughts, since without trying we never will know if they work.²³⁰ Yet they cannot be understood as final, since they are created by human endeavor and not by a supernatural force.²³¹

According to pragmatism, then, the theoretical meaning and practical function of a word cannot be separated. Second-order constructions do give semantic guidance and direction, but only first-order constructions can keep second-order constructions up-to-date. Participants know how to use words only because they can relate their meanings to what happens on the floor.²³² Words are empty, and acquire meaning by practical interaction. Language in this respect is an *instrument*, although a vital one: without the speakers’ being able to actually articulate and communicate with reference to the implicit rules of a practice, meaning cannot be established in the first place.²³³ In this respect, social constructions have a *public* and *practical* status. “Public” because the actions of participants in a practice can only be explained and judged in terms of the rules of the practice that are known to all; “practical” because social constructions derive their meaning and value from their application.

Many pragmatists thus follow Wittgenstein in his rejection of private language.²³⁴ Reasoning or thinking assumes the condition of following a rule that can be known to others. Otherwise, it would not be possible to distinguish a right reason from a wrong reason. In pragmatism there is no epistemic problem, in other words: when individuals are asked about the why and wherefore of their actions, they cannot refer directly to their private experiences of the world but must put them into language. Constructing the world takes place at a first-order level, and

is thus inherently social. Experiences are meaningless until put in terms that are publicly accessible and understandable. As Rorty explains: “Only descriptions of the world can be true or false. The world on its own—unaided by the describing activities of human beings—cannot.”²³⁵

In conclusion, pragmatist epistemology combines a dynamic (practical) with a rational (public) approach to human communication. The practical application of a construction establishes its intersubjective meaning if participants put their *particular* experiences and sensations of the construction into *rational* terms that can be understood and discussed. It can be argued, accordingly, that pragmatism fails to appreciate the epistemic orders of construction in their own right. Pragmatist theory neglects two basic aspects of human communication: non-contextual standardization and non-rational experiences. As we will see, these conceptual gaps in pragmatic epistemology have an effect on pragmatist political theory as well.

4.3.4 Pragmatist political theory

Pragmatist theory in general has a strong normative dimension, since it is focused on renewal and critique; it concentrates on establishing what is worth striving for. William Galston writes: “Philosophy, like deliberation, is the collective effort of preparing ourselves to recognize what is worthy of our assent.”²³⁶ Political theory, in turn, can be said to be the collective effort of deliberating about what is worthy of our assent. From the perspective of pragmatist epistemology, it is thus quite plausible to state that political theory is concerned with procedures that regulate the public deliberation of (the value or meaning of) social constructions.²³⁷ The meaning of constructions cannot be assumed as final; hence, public control mechanisms are needed to check their just status. And since the people are the stakeholders in political practice, they need democratic platforms where they can discuss the functionality of political practice. Full public deliberation is the only means to a result. A reasonable political theory would thus be, in the words of Gutmann and Thompson, “morally justifiable *from the perspective* of each citizen.”²³⁸ Analogous to pragmatist epistemology, then, pragmatist political theory has a radical democratic twist: it is only valuable if it “works,” yet this can only be ascertained with full public discussion. So, pragmatist political theory studies *how* the community reconstructs and reflects on the status of social constructions of reality.²³⁹ Its goal is to find out how interests, opinions, and rules can justifiably be publicly articulated and weighed against other interests. Lessig writes: “Ordinarily, when we describe competing collections of values, and the choices we make among them, we call these choices ‘political.’ They are choices about how the world will be ordered and about which values will be given precedence.”²⁴⁰

What is needed then is a context of “publicity,” as Rawls (after Kant²⁴¹) calls it, a situation in which people “are in a position to know and to accept the background social influences that shape their conception of themselves as persons, as well as their

character and conception of their good.”²⁴² Publicity is thus a context in which people become conscious of the choices they have or, because of inhibiting constructions, do not have. Scholars like Elster, Benhabib, and Winner say something similar: they emphasize the importance of increasing public awareness of the political nature of artifacts and technologies by openly discussing their potentially detrimental effects. Since morality is no blueprint but, instead, needs to be created by reason, it is important to explicate the artificial and provisional status of preferences. This is done by formulating principles that frame the public discussion about the unwanted consequences of social constructions (preferences, values, beliefs, actions etc.).²⁴³ With this concern in mind, political theory needs to deal not only with the *procedures* that guide deliberation but also with the moral *competences* that ensure the use of public reason and thus the quality of argumentation. Moral competences should guide civic discussion, and this implies taking seriously such values as reciprocity, generality, and accountability.²⁴⁴ Tully aptly sums up the pragmatic idea of political theory: “It is a form of *practical* reasoning: the manifestation of a repertoire of practical, normative abilities, acquired through practice, to use the general term, as well as to go against customary uses, in actual cases.”²⁴⁵

I argued in Chapter 3 that the deliberative model of political theory is flawed because it is understood as the study of public deliberation. Deliberative democracy follows pragmatist epistemology in this respect: the process of political theory—the deliberation of social constructions—is public, and its purpose—the search for a practical (non-essentialist) solution to conflicts about constructions—is instrumental. My critique was concerned with the *identification* of politics as public deliberation—which process, I argued contrarily, has a private status in relation to politics. I established that politics is concerned with authorizing practices of preference formation (social constructions) from the perspective of keeping the balance between civil liberty and public order. Next, I argued that processes of deliberation themselves are not just private in relation to politics (civil), but also intrinsic, that is, focused on the good life. This intrinsic quality makes it necessary to include contextual and particular aspects of preference formation that cannot be well communicated.

In an analogous way, the same critique applies here. Because in pragmatist epistemology the epistemic problem is neglected—no principal distinction is made between the orders of construction—political theory is seen as a normative theory in which social constructions are understood as temporary or conditional, ever ready for public scrutiny. According to pragmatist political theory, the real value of social constructions can be determined only by public communication, which means that their practical meaning—which is full of non-rational aspects of course—is inherently rational. Moreover, the very standardization of social constructions is temporary, since an update of the standard will become necessary if new insights emerge about the practical application of the particular constructions.

An integration of both non-rationality and authority is imperative for any political theory, though—just as it is in any adequate epistemology of communication.

Wittgenstein's insight that language is a human construction and not an empirical fixation is important, to be sure. Words do not have an intrinsic meaning but only acquire meaning in practice. This means that constructions need not only to be firmly rooted in practices so as not to become devoid of functionality, but also to be rationally explicated. This is the main pragmatist argument. In our terms: second-order constructions need to be in touch with first-order constructions, while the latter also need to be occasionally checked by the former.

But Wittgenstein's insight points to two other issues, as well. First, something is lost in the act of constructing reality—namely, the non-linguistic sensation of reality. If a social construction must be related to its functioning in a practice—as Wittgenstein argues—it can be argued therefore that somehow these zero-order constructions need to be incorporated in socially constructing reality. But since—obviously—rationality is not equipped to encompass non-rationality, social-constructivist epistemology will need to include a metaphysical element.²⁴⁶ As I said in Chapter 2, beneath the many (semi-)theoretical constructions, all kinds of non-rational sensations exist. The fact that they are hard to communicate does not diminish their importance.

Second, social constructivism must lead to a defense of *formal* or *authoritative* standardization. It could be argued that because meaning is socially constructed, the great difference between a word and the way it is used needs to be protected with a criterion that orders processes of social construction. Precisely because constructions acquire their real meaning in the dynamics of the practice, an automatic renewal of a standard (each time new and potentially valuable insights arise) will *obstruct* the necessary space between the construction of reality and its experience. A detailed structuring of the practice would lead to stagnation, because it would artificially close the space between the practical creation and the theoretical standardization of meaning (second order construction). The issue of installing *authority*, in this respect, is important in order to protect the essential differences between the orders of construction.

4.4 Postulates of political theory revisited

I conclude this chapter by revisiting the postulates of political theory. It is my aim to revise them in the light of the critical analysis of pragmatist epistemology so far.

4.4.1 Political theory is not simply social constructivist but is a third order construction

If we revisit the second postulate—about the social constructivist nature of political theory—it is now rather unclear what this actually means. Given my foregoing analysis concerning the different orders of conceptual construction, both statements

in the postulate—that all theory is social-constructivist and that political theory needs to make this explicit—deserve some scrutiny. The question is *what* should be made publicly explicit and what the so-called political status of a public discussion is. To simply deduce from social constructivism that reality is inherently politically constructed and that political theory needs to deal with it only increases the vagueness as to what political theory is about.

What is needed is a conception of political theory that not only rises above the call for public discussion but takes seriously what lies beneath it. In line with the dual task of politics as jurisdiction—that is, executing public authority while preserving civil liberty—political theory needs to *investigate* the statuses of social constructions in order to attain the intellectual authority to legally structure these processes. To be sure, then, political theory is involved in public discussions about the effects of the social world, but it speaks from a political point of view. Public discussions are not automatically political discussions, and vice versa. In this respect, an epistemology of will formation is needed *in relation* to the need of authoritative rule. Political theory is about understanding how to scrutinize society and rule it. To this end, it rationalizes society at different levels from the perspective of the polity.²⁴⁷

In relation to the orders of construction, i.e., from an epistemological perspective, I therefore call political theory a *third-order construction*. Political theory investigates how to reconstruct second-order rationalizations (institutions, rules, protocols, regulations) of natural first-order practices in the light of the need for a public authority that rules—that is, that assembles practices of second-order constructions (institutions) into a political whole. Political investigation is done with a specific purpose: to provide a balanced juridical framework for social practices. Between these practices, public discussions should take place in which general insights about the practice are being examined and compared *without* drawing political consequences. Political theory, then, is not about such public deliberations, but about legally constructing second-order constructions. It studies not how to organize a good childcare practice, for example, but how legal rules can encourage childcare practices to develop and improve *themselves*—and in which public deliberation certainly can be valuable.

The pragmatist conception of politics focuses on public discussion, because it does not fundamentally distinguish between the different orders of constructions; differences between, on the one hand, experiencing a practice and discussing it and, on the other, between regulating a practice and discussing how the regulations relate to its functioning. In a pragmatist conception, public discussion about the practice suffices. On the one hand, having sensations and experiences takes place in a public language, while ill-functioning rules will be adjusted to fit valuable experiences explained and justified through public deliberation. No independent epistemological status for political theory is being distinguished here.

4.4.2 Political theory is not only practical but also metaphysical

The next postulate (initially the first) is about the purpose of political theory. It was said that the success of political theory lies in its practicality (or, in Elster's words, its "instrumentality"). It should solve political problems by reconstructing conflicting social constructions. "Practicality," however, means not that social constructions are merely reconstructed in a helpful or useful way, but that this reconstruction also needs to be done fairly. This condition implies a public framework of deliberation and justification to check the reasonability of the political reconstructions. This must be done without reference to comprehensive doctrines about the good life. Because political reconstructions should pass the test of public reasonableness, no particular ideas of the world can play a part in such a discussion;²⁴⁸ they ought to be justified to others, Gaus says, because—and now he quotes Jeremy Waldron—our arguments "are our connection with the considerations that ultimately matter to us."²⁴⁹ Public reason voices what we care and feel strongly about. But is it public reason *itself* that we feel so strongly about, or is it *the content of what is voiced by* public reason? Surely, it must be the latter. Recalling Gaus's own distinction between publicly justified beliefs and our thoughts (or considerations) about the world itself,²⁵⁰ it seems peculiar to distinguish between them beforehand. How can beliefs that matter to us be justified *without* relating them to the way we conceive of the world? If I care about good childcare and I would like to publicly discuss that interest, a whole array of very particular convictions will inevitably play a part in the discussion. Not just about ideal opening hours or safety precautions but also (or rather: especially) about the circumstances in which a child feels safe, or what particular character traits make a good child care employee. What matters in such a discussion is always closely connected to how we see the world, or what we think is a proper way of living. To politically deal with practices of childcare in a reasonable way, it is thus necessary to have comprehensive knowledge of these practices.

Differently put, if political theory is to be defined as practical, a connection also needs to be made with certain particular experiences in practices that will not easily conform to a public language, but are meaningful nevertheless. This knowledge needs to be incorporated in order to successfully reconstruct a practice. This does not mean that the political theorist (or the politician) needs to know all the intricacies of a practice in order to know how to govern it—if only because zero-order constructions can hardly be communicated. Just as Plato argues, in the words of Mary Louise Gill, "The statesman directs the experts who are, as it were, the practical arms of his expertise: the orator, the general, the judge, and the teacher."²⁵¹ Hence, precisely from the perspective of political theory as a third-order construction, the ins and outs of a practice can only be taken care of by legally organizing its rules (second-order constructions).²⁵²

The above considerations lead to the conclusion of the *inevitability of political metaphysics*.²⁵³ When we conceive of political theory as a third-order

construction—one which, on the one hand, makes highly abstract interpretations of practices and, on the other, connects these abstractions with the experiential world—political metaphysics is its logical consequence.

4.4.3 Political theory is intersubjectivist – but symbolically

In pragmatist political theory, intersubjective communication is pictured not only as an epistemological inevitability but as a normative necessity. Democratic politics has a wide river of public legitimacy to cross. The political practice is “owned” by the demos. Hence, a political theory should focus on the intersubjective constitution and justification of the political practice.

Now, although democratic politics surely has an intersubjective element, we need to be cautious about the scope of our inquiry. In the light of our investigation into the different orders of construction—and of the contention that politics is a third-order construction—we should reject the *identification* of the normative and epistemological elements of political intersubjectivity. From the perspective of political theory as a third-order construction, “political intersubjectivity” means something different than it does from the perspective of political theory as a public process of rational reconstruction. As I pointed out, we should have reservations about the possibility of attaining intersubjectivity at a second-order level of construction. The achievement of a consensual definition about the meaning of a practice at this level is already much more difficult than the attainment of a certain interactive harmony in coping and attuning with the practice (at the level of the first order).²⁵⁴ The intersubjective discussion by a group of people doing a project, for example, can be related to the actual first-order dynamics of this project, while, at a political level, this reference to first-order constructions is simply impossible (only indirect narratives remain). The participants, being real-time witnesses of the occurrence, talk about what has happened. Making such first-order constructions explicit, nevertheless, requires a drastic second-order translation. Every participant has different opinions about certain things and does things in an individual way. Second-order rules, accordingly, inevitably have a conciliatory status, being a balanced summary of (zero- and first-order) practices. Practical intersubjectivity is here already quite a radical translation of the other orders of personal meaning-giving and mutual attunement. Discourse about second-order constructions explores the possibility of a joint understanding of the practice’s function, with the preliminary purpose that participants feel comfortable in it, both on a personal level (zero order) and on the day-to-day level of getting along with each other (first order). However, if this second-order discussion brings no success—keeping in mind that participants will never be equally pleased with the agreed-upon rules—*decisions* need to be made. The next issue on the group agenda, then, is *how to order the practice* in a manner that accepts the impossibility of rational consensus—a question that cannot be answered properly without taking into account the knowledge obtained at the

other levels of construction. At this point, participants need to formulate a conception of the practice that describes its practical success as an abstract conception, one which nevertheless refers both to the substantiality of the practice itself and to the experiences of the participants.

Intersubjectivity at a third level is even more abstract. It needs to make sure that participants in a second-order practice have the constructive tools, so to speak, to order their practice successfully. The intersubjectivity reached at a third-order construction is thus determined by the successful relation that participants can establish between their satisfaction about the practice's functioning and their new access to constructive theoretical tools. The idea of political intersubjectivity is very different than the discursive-consensualist idea of political intersubjectivity of the pragmatist. Even though the public is the legitimate participant in any political practice, the public's expertise about the functioning of the practice is severely limited. The public "experiences" politics indirectly, through the way third-order constructions influence social institutions. Hence, despite being the source and target of political rules, the public will experience a great interpretational divide between the realities of their practices and the way these practices are translated by their representatives as object of political rule.

The morality and epistemology of democratic politics do not match, accordingly. Notwithstanding the democratic inevitability of public involvement in the political practice, the public can be no expert in *politically translating or reconstructing* different orders of knowledge into political constructions. Political theory should investigate how the public can cope with political ordering. In spite—or perhaps because—of the epistemic problem, it is essential to politically construct an abstract third order by reconstructing second-order practices while respecting first-order intersubjectivity. The polis needs a third order in which people can have the notion of being political members of the state, despite their hampered practical participation in the political practice. This implies that political intersubjectivity—a public political culture—is symbolic, but is nevertheless felt in the daily experience of practices.

4.5 Conclusion

All three postulates of political theory introduced in this chapter point to the idea of political theory as the study of public discussions about the quality of social constructions and practices. Political theory should provide the conceptual instruments to reconstruct society in a fair way—it is a pragmatic do-it-yourself kit for democracy, as it were.

I have argued that political theory is about organizing the polity in all its aspects. What I have called political theory as a third-order construction is aimed at an understanding of how people give meaning to things and construct knowledge, not just how they ought to reason and deliberate. An epistemology of processes of

will formation is the study of how reality is conceptualized and constructed, how knowledge is generated and communicated, and what kinds of knowledge can be distinguished. This analysis of the social construction of reality is a crucial aspect of political theory, assuming its object to understand how to structure or govern the institutional or theoretical reality of civil practices in which reality is constructed.

Politics as jurisdiction means governing the institutionalization of practices of will formation, and this implies having a notion of how wills or preferences are formed. The study of politics entails unraveling the complexities of social constructions in order to provide a public framework that structures these constructions.

(Notes)

¹⁸¹ See especially: J. Rawls ([1993], 1996) *Political Liberalism*, pp. 4-11.

¹⁸² To be sure, I do not understand metaphysics as “social ontology,” that is, a more or less comprehensive theory of social objects and phenomena, such as organizations and collective goals. Rawls’s theory would fit in this definition. Ontology is usually juxtaposed to “old school” metaphysics, the latter being essentialist, the former logical and analytic. For such a conception of ontology, see: D.R. Koepsell (2000) *The Ontology of Cyberspace: Law, Philosophy and the Future of Intellectual Property*, Chapter 9. In line with the conclusion of Chapter 2, I prefer a definition of metaphysics as the study of aspects of reality which cannot be rationally understood. Compare, for example, Simon Blackburn’s definition of metaphysics as “the enquiry that raises questions about reality that lie beyond or behind those capable of being tackled by the method of science,” Blackburn, *Dictionary of Philosophy*, p. 240. Cf. the following—less attractive—definition: “[Metaphysics is] the philosophical investigation of the nature, constitution, and structure of reality.” R. Audi, ed. ([1995], 2001) *The Cambridge Dictionary of Philosophy*, 2nd ed., p. 563.

¹⁸³ W. James ([1907], 1991) *Pragmatism*, p. 26, italics WJ.

¹⁸⁴ Rawls, *Political Liberalism*, p. 37.

¹⁸⁵ J. Rawls ([1985], 2001) “Justice as Fairness: Political not Metaphysical.” In this respect, much of current political theory still resembles the ambition of post-WW II neo-positivism to uplift the positivistic divorce between science and politics in order to empower politics in dealing with social issues and problems of justice.

¹⁸⁶ Habermas, *Facts and Norms*, pp. 296-297.

¹⁸⁷ Here I do not make a difference between reasonable and unreasonable ideas of the good, as Rawls does. See Rawls, *Political Liberalism*, p. 36.

¹⁸⁸ “The essential point is this: as a practical political matter no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state.” Rawls, “Justice as Fairness: Political not Metaphysical,” p. 390.

¹⁸⁹ J. Rawls ([1989], 2001) “The Domain of the Political and Overlapping Consensus,” p. 480.

¹⁹⁰ One could say that Rawls only restates in *political philosophical* terms what he stated in *moral philosophical* terms in 1951, namely, that the “objectivity or subjectivity of moral judgments depends not on their causes ..., but solely on whether a reasonable decision procedure exists” J. Rawls ([1951], 2001) “Outline of a Decision Procedure for Ethics,” p. 8. Cf.: “[M]oral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept. Apart from the procedure of constructing the principles of justice, there are no moral facts.” J. Rawls ([1980], 2001) “Kantian Constructivism in Moral Theory,” p. 307. See also J. Rawls ([1971], 1999) *A Theory of Justice*, revised edition, p. 75.

¹⁹¹ However, unlike Rawls, Gaus rejects the possibility of descending from abstract public justification to making up our political institutions. Public justification is essentially inconclusive. Therefore political institutions cannot be merely expressing agencies of our publicly justified morality, they need to respond to the inconclusiveness of the very public justifications as well. Moreover, Gaus in general is very critical about Rawls’s political liberalism. See G.F. Gaus (2003) *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project*, Chapter 7. Henceforth: *Contemporary Theories of Liberalism*.

¹⁹² To be sure, Rawls calls moral epistemology metaphysical *as well*. The public justification of principles should be done politically, based on securing reasonable agreement. I agree with Gaus that it is unclear how questions of public justification can do without epistemology.

¹⁹³ G.F. Gaus (2000) *Political Concepts and Political Theories*, p. 7. Henceforth: *Political Concepts*.

¹⁹⁴ G.F. Gaus (1996) *Justificatory Liberalism: An Essay on Epistemology and Political Theory*, p. 4. Henceforth: *Justificatory Liberalism*.

¹⁹⁵ Gaus, *Political Concepts*, p. 38.

¹⁹⁶ “Where are you, and in which direction should you go? Clearly, an inconsistent map is no help at all.” Ibid.

¹⁹⁷ “[T]o master a word (or a conceptual term) is to master its use or function....” Ibid., p. 15.

¹⁹⁸ E.A. Huppel-Cluysenaer (2000) *Wetenschapsleer voor juristen* (textbook edition), p. 198. Henceforth: *Wetenschapsleer*.

¹⁹⁹ Gaus, *Political Concepts*, p. 38.

²⁰⁰ L. Wittgenstein (1952) *Philosophische Untersuchungen*, §198.

²⁰¹ Unlike the “moderate” version of social constructivism, which stresses only a theory-based perception of reality, and maintains the possibility of objective science (by explicating the embedded theories). See K.R. Popper ([1972], 1979) *Objective Knowledge: An Evolutionary Approach*, Chapter 3.

²⁰² Einstein’s theory of gravity influences our way of looking at an apple falling out of a tree, but so can the Biblical story of Adam and Eve or the holiday snapshots of last year’s bungee-jumping adventure in New Zealand.

²⁰³ L. Winner (1986) *The Whale and the Reactor: A Search for Limits in an Age of High Technology*, pp. 28-29, italics GD.

²⁰⁴ Hausmann's boulevards were not only designed to please the *flaneurs*, but to facilitate the army and the police in taking control of the streets in the case of riots or other disturbances of the public order. Robert Moses is notorious for his flyovers leading to beaches and parks for the upper middle class. These flyovers were too low for public transport buses to pass underneath. This way, recreational areas were impossible to reach for most black and Hispanic communities from the poorer areas of New York who depended on public transportation for their mobility.

²⁰⁵ John Dewey cited in: M.J. van den Hoven (1995) *Information Technology and Moral Philosophy: Philosophical Explorations in Computer Ethics*, p. 51, nt. 92. Henceforth: *Information Technology and Moral Philosophy*. More on Dewey in Chapter 8.

²⁰⁶ Gaus, *Political Concepts*, p. 16. See also Huppes-Cluysenaer, *Wetenschapsleer*, pp. 196 ff.; and Gaus, *Political Concepts*, pp. 12ff. See also J. Rawls ([1955], 2001) "Two Concepts of Rules," p. 34.

²⁰⁷ B. Latour (1987) *Science in Action: How to Follow Scientists and Engineers through Society*.

²⁰⁸ P. Winch (1958) *The Idea of a Social Science and its Relation to Philosophy*, p. 32, henceforth: *Idea of Social Science*. See also E.A. Huppes-Cluysenaer (2002) "Informal Rules do not Exist," p. 10: "This intersubjective definition of the world originates and develops in the interactions that are contained in a social practice. So internal rules contain the knowledge of the participants of a certain practice concerning the meaning of the words spoken in the context of that practice."

²⁰⁹ Gaus, *Political Concepts*, p. 16.

²¹⁰ Gaus suggests that a community of private meaning givers simply cannot communicate, for there is no shared practice that provides the reference point for mutual intelligibility. "[W]ithout a solid core of publicly justified beliefs, we would be pushed into a solipstistic world...." Gaus, *Justificatory Liberalism*, p. 121.

²¹¹ Rawls, "Two Concepts of Rules," p. 37.

²¹² But without baseball players *actually* stealing bases, the game of baseball would not exist either.

²¹³ This certainly does not automatically imply that all democratic bodies should be organized with the intention to maximize democratic participation (although many people think so). Still, the powerful moral relation between intersubjective epistemology and the *legitimation* of democratic politics is clear.

²¹⁴ Section 1.3.

²¹⁵ Cf. Marres, *No Issue, No Public*, p. 69: "To approach the organisation of a public as a political process is then also a way of trying to do justice to contingent, open-ended, but therefore no less crucial attempts to produce a public."

²¹⁶ It could be said that the publicity imperative is impacting political theory as it is impacting politics. Social constructivism applied to political theory should lead to an open

attitude towards fellow political theorists, and the importance of publicly deliberating political theories. Thus, according to Karl Popper, in *The Republic* Plato not only portrayed an unacceptably undemocratic society but made the portrayal itself in an undemocratic manner. See K.R. Popper ([1945], 2002) *The Open Society and its Enemies*, Volume One. Cf. Mill, *On Liberty*, pp. 19 ff.

²¹⁷ It is significant how the publicity imperative again plays a confusing role in this political-epistemological discussion. The maxim to subject the social construction of the world to a public process of discussion is seen as the foundation of political theory.

²¹⁸ Rorty—being a true pragmatist—opposes this. See section 1.4. A somber illustration of this phenomenon is that politicians, in public discussions, by their actions and with their arguments, do not really differ from, say, journalists concerning a topic. The politicians tend to lose their distinguished status during public discussions.

²¹⁹ The next step would be to relate such a rational understanding to the existing rules or constituted constructions of the practice, and discuss the relation. See below on the relation between the functioning of the practice (seen from different angles), the explicit discussion about it, and the rules that regulate the practice.

²²⁰ See Aristotle, *Nicomachean Ethics*, 1105a17-1105b11; Huppes-Cluysenaer, “Individual Realism of Aristotle;” and F. Varela (1999) *Ethical Know-How: Action, Wisdom and Cognition*, pp. 4-6; and J. van Brakel (2006) “De-essentializing across the board: no need to speak the same language,” pp. 275-276. Henceforth: “De-essentializing across the board.”

²²¹ Huppes-Cluysenaer, *Wetenschapsleer*, pp. 231-232. See also Huppes-Cluysenaer, *Waarneming en theorie*, pp. 207 ff. See also Chapter 6, in which Aristotle’s epistemology will be discussed.

²²² Huppes-Cluysenaer, *Waarneming en theorie*, p. 208, translation GD.

²²³ Or: after the sun has set, we expect it to rise again. This belief raises the problem of induction: can we assume, that, having knowledge or experience of certain observations of events in the past, those events will occur again in the future? Logically we cannot, and precisely therefore Hume thought we create beliefs, expectations and conventions. Having them is common sense; otherwise life would be impossible to live. For an interesting discussion, see Popper, *Objective Knowledge*, Chapter 1.

²²⁴ “It is impossible to describe the individuality of a particular cat in such a way that the best painter in the world, having never seen the cat, could produce a painting of it from which it would be immediately recognized by people who knew it. Nonetheless, most people normally have no difficulty recognizing a particular cat. There is therefore a kind of knowledge that cannot be described or defined in general terms, viz. knowledge of the individuality of things. This knowledge is acquired in direct contact with things and is termed intuition by Aristotle.” Huppes-Cluysenaer, “The Individual Realism of Aristotle,” pp. 16-17.

²²⁵ Huppes-Cluysenaer, “The Individual Realism of Aristotle,” p. 6. Huppes-Cluysenaer has set out the epistemic problem by a close reading of Aristotle’s work. See also Huppes-Cluysenaer, *Waarneming en theorie*, pp. 19 ff.

²²⁶ A nice analogue is how athletes describe the non-rational qualities of their performances. It can make sports interviews either notoriously boring or outright fascinating. The description of these qualities is inevitably vague. Explaining their success, for instance, athletes say things like, "I felt very relaxed that day," "It all came together," "I stayed cool," "I just did my thing." There is a gap between their experiences at the time of action and the words that describe them. Still, despite the imprecision, these words do make sense. The phenomenon of the difference between a particular sensation and expressing it by words is familiar to artists as well. The pianist's explanation of why the collaboration with the orchestra was so truly magic that night is similar to the athlete's: vague and abstract. Only the best of orators can effectively narrate the original feeling.

²²⁷ See also Rorty, *Contingency, Irony, and Solidarity*, p. 14, where he agrees with Davidson: "Davidson's point is that all 'two people need, if they are to understand one another through speech, is the ability to converge on passing theories from utterance to utterance.'"

²²⁸ Rorty, *Contingency, Irony, and Solidarity*, p. 17. Or as Jaap van Brakel puts it (following W.V. Quine): "Meaning requires no more than fluency and effectiveness of dialogue: successful negotiation and attunement, smooth conversation." Van Brakel, "De-essentializing Across the Board," p. 61.

²²⁹ Davidson cited in: Rorty, *Contingency, Irony, and Solidarity*, p. 15. Rorty himself says: "Our language and our culture are as much a contingency, as much a result of thousands of small mutations finding niches (and millions of others finding no niches), as are the orchids and the anthropoids." Ibid., p. 16.

²³⁰ "You must bring out of each word its practical cash-value, set it at work within the stream of your experience." James, *Pragmatism*, p. 26.

²³¹ "A criterion that functions as an intersubjective rule for testing assertions of correct use in some circumstances is itself questioned, reinterpreted, and tested in other circumstances, relative to other criteria that are *provisionally* held fast." J. Tully ([2002], 2004) "Political Philosophy as a Critical Activity," p. 90, italics GD.

²³² "Only by reference to the practice can one *say* what one is doing." Rawls, "Two Concepts of Rules," p. 39.

²³³ "It is the mark of a practice that being taught how to engage in it involves being instructed in the rules which define it, and that appeal is made to those rules to correct the behavior of those engaged in it. Those engaged in a practice recognize the rules as defining it." Rawls, "Two Concepts of Rules," p. 36. See also *ibid.*, pp. 37 ff. See also Winch, *Idea of Social Science*, p. 32, and Gaus, *Justificatory Liberalism*, p. 117.

²³⁴ "The limits of one's language mark the limits of one's world." T. Ball, J. Farr, and R.L. Hanson (1989) "Editors' Introduction," p. 2.

²³⁵ Rorty, *Contingency, Irony, and Solidarity*, p. 5. See also: *ibid.*, pp. 21-22. "For it is essential to my view that we have no prelinguistic consciousness to which language needs to be adequate, no deep sense of how things are which it is the duty of philosophers to spell out in language. ... [W]e shall not think of our 'intuitions' as more than platitudes,

more than the habitual use of a certain repertoire of terms, more than old tools which as yet have no replacements.”

²³⁶ Cited in: Van den Hoven, *Information Technology and Moral Philosophy*, p. 16, nt. 16.

²³⁷ See e.g. Rawls, *Political Liberalism*, pp. 90 ff.

²³⁸ Gutmann and Thompson, *Democracy and Disagreement*, p. 26, italics GD. Rawls calls this the liberal principle of legitimacy, writing that “a political conception of justice that all citizens might be reasonably expected to endorse can serve as a basis of public reason and justification.” See: Rawls, “Idea of Public Reason Revisited,” p. 137. See also: Rawls, *Political Liberalism*, pp. 137, 218.

²³⁹ J. Campbell (1992) *The Community Reconstructs: The Meaning of Pragmatic Social Thought*. According to Hilary Putnam “the intelligent conduct of communal inquiry is what democracy is all about, for John Dewey.” Cited in: Van den Hoven, *Information Technology and Moral Philosophy*, p. 44. To be sure, however, a radical pragmatist like Rorty does not argue for a publicity condition but for, what can be called, a *plurality condition*: from a multiplicity of private conceptions of the good he believes (temporary) conceptions of the public good will emerge, analogical to biological evolution.

²⁴⁰ Lessig, *Code*, p. 59.

²⁴¹ See section 7.4.

²⁴² Rawls cited in: S. Mulhall and A. Swift (1992) *Liberals and Communitarians*, p. 197. See also Gutmann and Thompson, *Democracy and Disagreement*, pp. 95-127.

²⁴³ For an early formulation of this idea, see Rawls, “Outline,” p. 10: “Perhaps the principal aim of ethics is the formulation of justifiable principles which may be used in cases wherein there are conflicting interests to determine which one of them should be given preference.”

²⁴⁴ Gutmann and Thompson, *Democracy and Disagreement*, pp. 13 ff.

²⁴⁵ Tully, “Political Philosophy as a Critical Activity,” p. 90, italics, JT. “Public reason” refers to the “kind of reasons on which citizens are to rest their political cases.” Rawls, “Idea of Public Reason Revisited,” p. 165.

²⁴⁶ Cf. M. Oakshott (1962) *Rationalism in Politics and Other Essays*, pp. 1 ff.

²⁴⁷ Indeed, this is in the spirit of Plato (*Symposium*, p. 246) and Aristotle, both of whom consider politics the science of sciences. See Aristotle, *Nicomachean Ethics*, 1094b1-11 (“[P]olitics uses the rest of the sciences”), and also 1102a1 ff. See also Aristotle ([ca. 330 BC], 1984) *The Politics*, 1260a15-22: “Hence the ruler must possess virtue in completeness (for any work, taken absolutely, belongs to the master-craftsman, and rational principle is a master-craftsman); while each of the other parties must have that share of this virtue which is appropriate to them.” See also L.J. van Apeldoorn (1933) *Inleiding tot de studie van het Nederlandse Recht*, p. 6. Henceforth: *Inleiding*.

²⁴⁸ See also the discussion in section 2.4.

²⁴⁹ Gaus, *Justificatory Liberalism*, p. 40.

²⁵⁰ Section 4.2.1.

²⁵¹ M.L. Gill (2005) “Method and Metaphysics in Plato’s Sophist and Statesman.”

²⁵² Likewise, it would be nonsense—and ultimately impractical—to exclude the particularities of a religion from the political debate merely on the grounds that it would be impossible to reach consensus about certain religious values (understood as comprehensive ideas of the good). Political theory is not a moral debate but a jurisdictional debate. In the end, the object is to give law to practices of will formation. The practical aspect of political theory, therefore, does not engineer results in line with certain values but governs them; it reconstructs in order to let people realize things themselves. Ultimately, the people decide themselves what they deem important, and hence what needs to be considered politically.

²⁵³ See also section 2.4.

²⁵⁴ And hopefully to be more specific than Habermas when he states, quite beyond understanding: “The intersubjectively shared space of a speech situation is disclosed when the participants enter into interpersonal relationships by taking positions on mutual speech-act offers and assuming illocutionary obligations.” Habermas, *Facts and Norms*, p. 361.

PART TWO

LESSONS FROM THE PAST

CHAPTER 5

Constant's Legacy: The Modernist Misunderstanding About the Greeks

5.1 Introduction

In Chapter 3, I rejected a view of politics as will formation. I established that politics should not be understood as a grand agora where citizens gather to make up their minds and weigh their private interests for the sake of the public good. Nor is politics concerned with a public translation of preferences; it ought to concern itself instead with the juridical organization of civil practices *in which* preferences— independently of political decision-making—are generated, defended, criticized, and institutionalized. Politics as jurisdiction is based not on the distinction between private and public preferences, but on that between state and society. I have established a view of democratic will formation processes as non-political (“private,” according to Jon Elster’s scheme) and of their purpose as focused on concrete knowledge concerning human activities (“intrinsic” according to Jon Elster’s scheme). My new, fourth model of democracy, civil democracy, has begun to make sense in light of this crucial distinction between civil processes of will formation and the political process of jurisdiction.

Now, in the second half of this thesis, I will elaborate on the problematic aspects of politics as will formation and try to show some ideological roots of politics as jurisdiction by way of a conceptual-historical study of the “public” and the “private.”

In the next two chapters, my focal point will be Greek political theory²⁵⁵, since it advances strong arguments for the civil model of democracy in relation to political jurisdiction. In contemporary political theory, however, a modernist understanding of Greek thought dominates: Greek political theory is depicted as precisely the opposite of the modern liberal tradition. The “private” is taken to stand for individual necessity in Greek thought and “the public” for freedom, while the modern liberal tradition alleges the opposite: the “private” stands for individual freedom and the “public” for political necessity. In Chapters 1 and 2, I already argued that a liberal portrayal of modern democracy is rather misleading, given the dominance of the publicity imperative. The Janus face of the modern idea of freedom is a critical awareness of the need to grapple with private preferences.²⁵⁶ In this respect, Greek political theory could be characterized as *more* liberal than the modern tradition, because, as I will argue, the distinction between will formation and jurisdiction is more strictly drawn in Greek political theory. It is a modernistic misunderstanding to emphasize the republican or deliberative aspect in Greek political theory. I will explain the disproportionate association of the forum tradition

with Greek political theory in the next chapter, in which I will also give an overview of some Greek public/private distinctions, notably of Plato and Aristotle.

5.2 Politics of “Ancients” compared with that of “Moderns”

Western modernity is often characterized as a heroic project starring “the Individual,” who is on a mission to emancipate himself from a manifold of imperatives that are irrationally justified by heredity, tradition, habit, force or divinity. Interestingly, this quest for individual autonomy is seen as the moral justification of modern politics; it is taken to be what democracy is about. Popular sovereignty is the political complement of individual emancipation: the individual as citizen is a rational lawgiver.

This view runs the risk of idolization, and anyone who defends it will need to explain how an individualistic account of modern history is consonant with the pervasive collectivist aspects of Western culture.²⁵⁷ The relation between individual liberty and the publicity imperative is a problematic one, as I said earlier; the steady moral pressure to emancipate is a questionable aspect of modernity. And as I have argued in the previous chapters, to establish democratic politics on the basis of a moral process of intersubjective reason-giving undermines the idea of the privateness of society. An instrumentalist portrayal of politics as a defense for individual rights seems to be converted into its opposite: an instrumentalist portrayal of private freedom that needs to be constantly scrutinized in public as way to attain political legitimacy.

The Enlightenment ideology of individual emancipation has greatly influenced historic retrospectives of the public/private distinction—the Greek account in particular.²⁵⁸ The inception of this process can already be traced at the beginning of the nineteenth century. Benjamin Constant’s speech at the *Athénée Royal* in 1819 was—and remains—very influential in advancing a modernist interpretation of the Greek public/private distinction.²⁵⁹ In that speech, Constant salutes the modern idea of freedom and argues that only with the “commercial tendency of the age” and the rise of the nation-state has the preservation of individual freedom become possible. The state, as Constant describes it, has become a public keeper of a system of private rights, thereby ensuring freedom and “the enjoyment of security in private pleasures” for its subjects. By contrast, Constant criticizes ancient liberty for being overly political, contending that “among the ancients the individual, almost always sovereign in public affairs, was a slave in all his private relations.”²⁶⁰ To the ancients, Constant argues, real freedom only existed in the public domain, the place where individuals stepped out of daily life and reflected on philosophy and politics. The fact that the Greek citizen could politically realize himself was the very *embodiment* of freedom. However, Constant cautions that introducing the Greek idea of freedom in modern times—and specifically its notion of political power as the locus of freedom—would be dangerous and would lead to paternalism and

oppression. Constant reminds his audience of the tyrannical transformation of the high ideals of the Enlightenment, referring especially to the harmful influence of Rousseau's political ideas "steeped in ancient views which are no longer valid."²⁶¹

Many contemporary authors over the years have referred to Constant's speech, endorsing his thesis about the Greeks' disdain for the private sphere and their appreciation of the public sphere.²⁶² Habermas, for instance, describes the Greek public/private distinction in terms of the familiar opposition between *oikos* and *polis*: "Just as the wants of life and the procurement of its necessities were shamefully hidden inside the *oikos*, so the *polis* provided an open field for honorable distinction: citizens indeed interacted as equals with equals (*homoioi*), but each did his best to excel (*aristoi*ein)."²⁶³ Like Habermas various scholars have argued that the Greeks deemed the private sphere to be mediocre and inferior to the public sphere. The private sphere—the life of production and procreation—was associated with the household, in which the Greeks were driven by their wants and secured their livings. In contrast, the Greek public sphere is often characterized as the realm of freedom, the stage where immortality and greatness (*kleos*) could be achieved. In public, Greek men engaged in discussion and debate and escaped the exigencies of private necessity. The Greek public/private distinction functioned rather distortedly, it is often stressed: the public realm was reserved exclusively for male citizens and was thought to be superior to many aspects of the private sphere.²⁶⁴

The modernist interpretation of the Greek public/private distinction has created a stereotypical opposition between the classical and the modern public/private distinctions. As Benjamin Straumann puts it: "The thrust of Constant's argument exhibits thus very clearly a dichotomy between ancient republicanism and liberalism, a dichotomy which was to feature prominently in the historiography of political thought in general...."²⁶⁵ Indeed, Constant's speech has become the archetype of the market/forum distinction—which is the backbone of the "politics as will-formation" paradigm.²⁶⁶ The modernist interpretation of the Greek public/private distinction underlies many debates between republicans or communitarians, on the one hand, and liberal or deliberative democrats, on the other. It seems, however, that scholars who employ such a disapproving interpretation of Greek political theory do so especially to reinforce their own liberal defense of individual liberty and instrumentalist politics. Applauding democracy yet warning against Greek decadence may serve them more as a rhetorical device—ensuring that they will be praised as true defenders of individual liberty—than as an accurate conception of the Greek public/private distinction.²⁶⁷ The Greeks were quite conscious of the intricacies and peculiarities of the relation between individual liberty and public authority. Portraying the private as dependent and subordinate to the public is just too simplistic an interpretation of the Greek distinction. As Robert Wallace puts it: "An Athenian's freedoms were almost entirely unrestrained so long as he posed no substantive, material threat to other individuals or the polis."²⁶⁸ Individual freedoms,

although differently understood, were central to Greek political thought, yet they were judged in relation, not in opposition, to the public good. The technicalities and necessities of private life had a tangible effect on politics.²⁶⁹

As I will explain in the next chapter, both Plato and Aristotle were concerned with the relation between knowledge and politics, and technical knowledge, to be sure, was part of this question. Greek politics was not just an aristocratic display of virtue, but an activity of epistemic sharing across-the-board.²⁷⁰ The topic of Greek politics, which I describe as the issue of how much can be shared among citizens, included also economical and technical aspects of life.

5.3 The Greek affinity with a private depiction of will formation

It can be argued that the “jurisdiction approach” to politics has more affinity with Greek political theory than the “will-formation approach.” This point can be illustrated by returning to Elster’s article “The Market and the Forum,” in which he criticizes Hannah Arendt’s republicanism.

Arendt is greatly influenced by Greek political philosophy, as is well known, but Elster questions her reading of it. Arendt’s conception of Greek politics is too republican, he argues, since she understands it as a virtuous agonist show of passionate argumentation and rhetorical performance.²⁷¹ Elster turns to the classicist M.I. Finley to support his disapproval of Arendt’s agonist portrayal. Finley argues that the Greeks were more liberal and actually held a lot of thought in common with the modern conception of politics. According to Finley, the Greeks accepted an instrumental conception of politics and favored the possibility of exercising political rights over the actual execution of them.²⁷² Finley’s claim that the Greeks were modernists *avant la lettre* strengthens both Elster’s rejection of Arendt’s interpretation of Greek political theory and his support of deliberative democracy—Greeks have more in common with deliberative democracy than republicans are willing to admit being the message.

Arlene Saxonhouse, however, disagrees. She claims that Finley has a somewhat “magical” understanding of Greek democracy when he suggests that the Greeks “located the source of authority in the *polis*, in the community itself, and [that] they decided on policy in open discussion, eventually by voting, by counting heads.”²⁷³ Saxonhouse strongly opposes such romanticized classicism, since it gives the false impression that the ancient polis was the role model for modern democracy. The Greeks were not really interested in legislation, she points out—not so much because they deemed politics to be instrumental (“a means to a non-political end,”²⁷⁴ as Finley and Elster would have it) but because they perceived politics as much more complex than just an instrument of public deliberation and legislation.²⁷⁵ George Sabine makes a similar point. According to him, the democratic element of Greek politics was especially characterized by its *control* mechanism: “The interesting thing about Athenian government is ... not the Assembly of the whole people but the political

means which has been designed to make magistrates and officials responsible to the citizen-body and answerable to its control.”²⁷⁶ Greek politics was not a public decision-making tool for civic preference translation and transformation; the rule of law, not democratic assembly, was its ultimate goal. Precisely for this reason, Aristotle distinguishes between a conception of democracy “where all have a part in the offices, provided only they are citizens, but [where] law rules” and a conception in which “the multitude has authority and not the law.” No doubt he preferred the first option, for “where the laws are without authority, there popular leaders arise.”²⁷⁷ Ironically, and notwithstanding Elster’s doubts, Arendt actually acknowledges the Greek primacy of the rule of law, holding that “the Greeks, in distinction from all later developments, did not count legislating among political activities. In their opinion, the law maker was like the builder of the city wall, someone who had to do and finish his work before political activity could begin.”²⁷⁸ Political jurisdiction was ultimately the controlling element in the polis, for otherwise, as Saxonhouse puts it, the people would lose their individuality.²⁷⁹ Politics, Aristotle says, is the result of the impossibility of full civil liberty, that is, of living just as one would like. Unstable on its own, civil liberty needs to be safeguarded by political authority.²⁸⁰ In this respect, Judith Swanson’s thesis on the central place of “the private” in Aristotle’s political philosophy makes a great deal of sense. She argues that Aristotle conceives of the private as “constituted of activities that cultivate virtue and discount common opinion.”²⁸¹ Swanson’s analysis of Aristotle stands in opposition to Elster’s account of Greek political theory in general. While Elster stresses the deliberative element in Greek politics, Swanson and Saxonhouse stress its juridical element in relation to the inherent political relevancy of civil liberty.²⁸²

As will be explained more fully in the next chapter, Aristotle’s notion of politics is a prime example of a political theory that rests on an intrinsic understanding of the private as a place where people strive to act their best. Politics only works if a great investment is made in the institutionalization of virtuous practices, because without practical virtue there is no political virtue to begin with.

5.4 Conclusion

Ever since Constant’s speech on ancient and modern liberty, Greek political theory has often been understood as a conflict between public freedom and private necessity. In general, however, the Greeks saw the city as a setting in which public and private elements were interdependent. In the city, as Saxonhouse puts it, “there was no opposition between the self and the political entity of which one was a part,” which is not to say that the Greeks were “exclusively duty-bound who cared only for the welfare of the community.”²⁸³ Rather, they accepted the dependency of their own individual well-being upon the well-being of the polis. In this respect, the Greeks had a *private* conception of will formation.

By claiming that the deliberative or discursive understanding of politics

finds its roots in the classic defense of democracy, Elster misconstrues the Greek conception of politics.²⁸⁴ When he imputes the modernist mistake to the ancients, he shows how he himself—taking the private as the sphere of necessity and the public as the sphere of freedom—misunderstands the Greek idea of democratic will formation. The modern world’s pejorative reinterpretation of the classical distinction between private and public is both wrongheaded and simplistic, given how central individual freedom was to Greek political thought. Indeed, perhaps it was even a more unconditional prerequisite for practical wisdom than it is to the moderns.

(Notes)

²⁵⁵ Let it be clear that when I say “Greek”—as most scholars do—I mean “Athenian,” acknowledging Josiah Ober’s following caveat: “Whenever someone claims that the history of ‘the Greeks’ can teach us about ourselves, we should ask ‘which Greeks?’ ... The point is that today, when we say ‘the Greeks,’ we usually mean ‘the democratic Athenians’—and it is important to remember that Athens was not a community that manifested a typical ‘Greek culture.’ It is not generic ‘Greek culture’ that is relevant to modernity; it is the culture that developed in Athens and spread to other poleis in the late classical and Hellenistic periods.” J. Ober (2005) “Democracy, Knowledge, and Moral Change.” To be sure, although the term “Greek” is already too unspecific, the term “classical” would be even more so. There are considerable differences between for instance, Cicero and Aristotle, the former’s political theory being much more collectivist than Aristotle’s. To illustrate: “[O]ur country has given us birth and education ... so that she may appropriate to her own use the greater and more important part of our courage, our talents, and our wisdom, leaving to us for our own private uses only so much as may be left after her needs have been satisfied.” Cicero ([44 AC], 1828, 2000), *The Republic*, Book I, iv, p. 8.

²⁵⁶ See for more depth Chapter 7.

²⁵⁷ The ideological roots of which I sketched in Chapter 2, a typical, though impressionist, example being the collective desire for a pair of Nike sneakers as a way to show one’s freedom and individuality on the streets.

²⁵⁸ In the next chapter it will become clear that there is no such thing as “the Greek public/private distinction.”

²⁵⁹ For a recent approving citation of Constant, see J. Rawls (2001) *Justice as Fairness: A Restatement*, p. 2, see also pp. 142 ff.

²⁶⁰ All three quotes: B. Constant ([1819], 1988) “The Liberty of Ancients Compared with that of Moderns.”

²⁶¹ “Through their failure to perceive these differences, otherwise well-intentioned men caused infinite evils during our long and stormy revolution. ... The men who were brought by events to the head of our revolution were, by a necessary consequence of the education they had received, steeped in ancient views which are no longer valid, which the

philosophers whom I mentioned above had made fashionable.” Ibid. Constant’s liberalism is in line with the reactionary/restorative moment of that time, the Vienna Treaty having been signed 3 January 1815. Ironically (and regrettably), a few decades later Mill wrote in *On Liberty* in a Constantian spirit: “The ancient commonwealths thought themselves entitled to practise, and the ancient philosophers countenanced, the regulation of every private conduct by public authority, on the ground that the State had a deep interest in the whole bodily and mental discipline of every one of its citizens....” Mill, *On Liberty*, p. 13.

²⁶² E.g. I. Berlin ([1958], 1988) “Two Concepts of Liberty,” pp. 129, 172. J. Rawls (2001) *Collected Papers*, pp. 583, nt. 29 and 343, nt. 4. Rawls, *Political Liberalism*, pp. xxiii, 134. For neorepublicans see Ch. Mouffe (1996) “Democracy, Power, and the ‘Political’,” p. 246. Benhabib, *Public Space*, pp. 78-79. Kymlicka, *Contemporary Political Philosophy*, p. 295. Arendt, *Human Condition*, p. 30.

²⁶³ Habermas, *Structural Transformation*, p. 4. See also Arendt, *Human Condition*, p. 30 ff. Cf. John Dewey severely criticizing Greek assumed *dedain* for the empirical world, which reality, according to the Greeks, Dewey thought, was “crass, and obdurate, stubbornly un-ideal in character....” Cited in: R. Rorty (1990) “Pragmatism as Anti-Representationalism,” p. 2.

²⁶⁴ For another clichéd interpretation: “It is the myth that rationality consists in being constrained by rule. According to this Platonic myth, the life of reason is not the life of Socratic conversation but an illuminated state of consciousness in which one never needs to ask if one has exhausted the possible descriptions of, or explanations for, the situation. One simply arrives at true beliefs by obeying mechanical procedures.” Rorty cited in: J.P. Murphy (1990) *Pragmatism: From Peirce to Davidson*, p. 105.

²⁶⁵ B. Straumann (2006) “Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius’ Early Works on Natural Law,” p. 3.

²⁶⁶ Cf. the remark by Carl Schmidt’s: “In a very systematic fashion liberal thought evades or ignores state and politics and moves instead in a typical, always recurring polarity of two heterogeneous spheres, namely ethics and economics, intellect and trade, education and property.” Cited in: Mouffe, *Democratic Paradox*, p. 46.

²⁶⁷ See for instance Will Kymlicka’s observation that “[w]e no longer seek gratification in politics because our personal and social life is so much richer than that of the ancient Greeks,” which can be seen as a mark of intellectual idleness, a typical modernist way of dismissing Greek political theory. Kymlicka, *Contemporary Political Philosophy*, pp. 297-298.

²⁶⁸ R.W. Wallace (2007) “The Legal Regulation of Private Conduct at Athens: Two Controversies on Freedom,” p. 171. Henceforth: “Legal Regulation of Private Conduct at Athens.”

²⁶⁹ Ibid.: “Their laws protected the substantive, material interests of citizens or the city. Virtually every infringement of individual liberty responded to substantive, material dangers to other citizens or the community. Absent such dangers, the Athenians never doubted that in their private lives they were free, and so they were.” See also M. Foucault (1995) *Breekbare vrijheid: de politieke ethiek van de zorg voor zichzelf*, p. 89. Cf. the

ironical and pointed words by George Sabine: G.H. Sabine ([1937], 1961) *A History of Political Theory*, pp. 16-17 (henceforth: *History of Political Theory*). "The Greek was happily free both from the illusion that he had an inherent right to do as he pleased and from the pretension that his duty was the 'stern daughter of the voice of God'." See for a contrasting viewpoint: "[F]or Platonism, the relation between private and public spirit is purely an affair of *contrasts*. Private spirit is blind, while public spirit shows genuine insight; private spirit disintegrates, while public spirit binds together...." R.C. Lodge (1925) "Private and Public Spirit in Platonism," p. 24, italics GD.

²⁷⁰ Cf. J. Ober (2006) "From Epistemic Diversity to Common Knowledge: Rational Rituals and Cooperation in Democratic Athens."

²⁷¹ See for similar arguments: Benhabib, "Models of Public Space."

²⁷² Elster, "Market and Forum," p. 24.

²⁷³ Cited in: A.W. Saxonhouse (1996) *Athenian Democracy: Modern Mythmakers and Ancient Theorists*, pp. 26-27. Henceforth: *Athenian Democracy*. See also note Z in Ernest Barker's translation (1946) of: Aristotle's *Politics*, p. 128.

²⁷⁴ Elster, "Market and Forum," p. 19.

²⁷⁵ Saxonhouse, *Athenian Democracy*, p. 28.

²⁷⁶ Sabine, *History of Political Theory*, p. 6.

²⁷⁷ All quotes: Aristotle, *Politics*, 1292a9-10. Cf. *ibid.*, 1282a42-b6.

²⁷⁸ Arendt, *Human Condition*, p. 194. As I will explain in greater detail in Chapter 7, the *self*-legislative element of politics was introduced only during the Enlightenment, with the idea of politics *as will formation* thus emerging as a typical modernist way of understanding politics.

²⁷⁹ Saxonhouse, *Athenian Democracy*, p. 132; cf. J.A. Swanson (1992) *The Public and the Private in Aristotle's Political Philosophy*, pp. 95 ff. Henceforth: *Public and Private*.

²⁸⁰ Aristotle, *Politics*, 1316a40 ff.

²⁸¹ Swanson, *Public and Private*, p. 2. See also: C. Hupperts and B. Poortman (1997) "Introductie," pp. 50-54.

²⁸² See also Hupperts-Cluysenaer, *Waarneming en theorie*, pp. 19-22; and Hupperts-Cluysenaer, "Individual Realism of Aristotle."

²⁸³ Saxonhouse, *Athenian Democracy*, p. 364.

²⁸⁴ It is worthwhile to note that Arendt's basic critique of modern politics concerns its degeneration into an instrumental human activity. According to her, the substantive meaning of politics already was lost in the Latin translation of *zōōn politikon* with *animalis socialis*, which, she writes, "indicated an alliance between people for a specific purpose, as when men organize in order to rule others or to commit a crime." *Human Condition*, p. 23. To Arendt, precisely because of this focus on instrumental justice, the distinction between private and public withered away. "[W]e know that the contradiction between private and public, typical of the initial stages of the modern age, has been a temporary phenomenon which introduced utter extinction of the very difference between the private and the public realms, the submersions of both in the social." *Ibid.*, p. 69.

CHAPTER 6

The Possibility of Political Unification: Plato and Aristotle on the Public and the Private

6.1 Introduction

I concluded in the last chapter that the Greeks held a more sophisticated understanding of politics than is often suggested. In this chapter I will expand that argument by presenting a historic-conceptual development of the Greek public/private distinction. Instead of the usual opposition between *oikos* and *polis*, I will defend a double public/private distinction, one that I call “ethical,” on the one hand, and “administrative” on the other. Plato and Aristotle worked out this approach, the origins of which can be found in pre-Platonic views. Both scholars developed on the early Greek dialectic between private sacrifice and public sharing (section 6.2), shaping it into a more sophisticated theory. Their philosophies scientifically articulate the political art of balancing the affection for private autarky with the call for public sacrifice. Plato elaborates on the distinction between politics and science in two ways: at one level, he casts it as the relation between individual and political ethics, and at another, he recasts that same relation as an individual struggle within a legal context (section 6.3). Aristotle builds on Plato and examines what knowledge people can share politically. This brings him to distinguish between three forms of rational knowledge and connect them to politics. Aristotle’s take on the public and private results in a plea for civil self-sufficiency that is based on an argument about sharing knowledge in a civil environment (section 6.4). In this respect, Aristotle can be named founding father of the idea of civil democracy: that the process of developing and sharing knowledge is private—that is, civil or nonpolitical—and that its purpose is intrinsic—focused on living well (section 6.5).

6.2 Early Greek thoughts on public and private

Pre-Platonists such as Homer and Aeschylus give forceful portrayals in their writings of what is considered to be an irreconcilable conflict between the polis and the family. The polis commands male citizens to be ready to die for the benefit of the community, while the family expects the patriarch to fulfill his duty as protector and provider. Arlene Saxonhouse explains this dilemma of political loyalty or obligation with a reading of Aeschylus’ *Oresteia*. In that play, Agamemnon personifies the fated struggle between the private and public. He seeks to defend his family by retrieving his brother’s wife, Helen, who has been abducted by the Trojans. Agamemnon’s intention, however, eclipses itself, causing instead a complete disruption of the family. The vicious force of war causes great despair and devastation. On his way to revenge the Trojans, Agamemnon sacrifices his daughter Iphigeneia,²⁸⁵ while his

wife Clytemnestra, full of wrath, takes over the family back home.²⁸⁶ Saxonhouse believes that the *Oresteia* shows how Agamemnon's attempt to protect his family leads instead to its sacrifice for the sake of the city. No natural harmony exists between *oikos* and *polis*.

Political loyalty was still an important issue much later in Greek history, as the funeral oration of Pericles illustrates.²⁸⁷ Pericles' speech can be seen as an ultimate attempt to resolve the tragedy of the relationship between political power and private intimacy. The realization of the supreme good is represented by the life of the city, Pericles argues, with which both family and business matters need to conform. The city's glory is the good cause for which the soldiers of Athens gave their lives.²⁸⁸ Pericles stresses that without actually fighting for the city's greatness, no satisfaction of private affairs would have been conceivable.²⁸⁹

Despite a thriving Athens at that time, the rule of Pericles proved to be the end of Athenian supremacy. His words point to the impossibility of integrating the public and the private as long as the city's existence depended on physical domination. In his attempt to weigh the private against the public, Pericles took notice not only of the family unit as the element that needed to sacrifice some of its own concerns, but of the family's separate members as well. Not without reason did Pericles pay special attention to the *individual*, as it was an ultimate effort to convince the Athenians of the importance of waging war with the Spartans.²⁹⁰ Pericles' rhetorical exertions were, nevertheless, in vain: the process of Athenian individualization was steadily undermining civic loyalty for the city—which would be aptly illustrated by the later rule of the sophist Alcibiades.²⁹¹ Still, amidst the troubling times in Athens, Pericles made the Athenian *ideal* very clear in his oration. In a famous passage, he speaks of a harmonious balance of public and private:

There is no exclusiveness in our public life, and in our private intercourse we are not suspicious of one another, nor angry with our neighbour if he does what he likes; we do not put on sour looks at him which, though harmless, are not pleasant. While we are thus unconstrained in our private intercourse, a spirit of reverence pervades our public acts; we are prevented from doing wrong by respect for the authorities and for the laws, having an especial regard to those which are ordained for the protection of the injured as well as to those unwritten laws which bring upon the transgressor of them the reprobation of the general sentiment.²⁹²

These words on private open-mindedness and public restraint must surely have been an inspiration for both Plato and Aristotle. Pericles' vision provided them with a perfect working example for the development of their own political philosophies.

6.3 Plato: Knowing and sharing excellence

Later, in Plato's work, he studies the complex ways in which the public and the private knit the city into a whole.²⁹³ It is clear to him that the city cannot be preserved merely on the basis of individual sacrifice for the sake of a collective good. The public/private distinction is not a black-and-white choice between family and city, for such a choice would do justice to the richness of neither the private nor the public aspects of life in the city.

Plato builds on the Periclean dichotomy—thereby providing for another refutation of the modernist interpretation of Greek political theory. One of Plato's important moves is to draw the line between the public and the private along the politics/science distinction. His main interest is in the connection between knowledge and politics. He wants to know how the ideal of political harmony can be thought of as a *life science*, so that it can be known, mastered, and taught: "We are trying to define the whole conduct of life—how each of us can live his life in the most profitable way."²⁹⁴ According to Plato, to know the intricacies of accomplishing political harmony means understanding the complexities of the art of living itself.²⁹⁵ Instead of seeing politics as a conflict between *oikos* and *polis*, between family and polity, Plato understands politics psychologically (in the broad classical sense, to be sure). The art of politics depends on knowledge of the soul's dispositions, and this is why science (or philosophy) is so important: it studies the dispositions that cope with, and express, the desire to live well and master life's challenges.²⁹⁶ Politics thus cannot do without rulers who, in the midst of governing the polis, are also capable of contemplating the good life; good governance implies soul searching and virtuous action. Learning how to become wise by understanding the nature of goodness and then acting accordingly should bring good political results. It is in this respect that Plato's infamous plea for the philosopher king must be understood.²⁹⁷

Plato elaborates the politics/science distinction in two ways.²⁹⁸ The first sub-distinction involves the relation between individual and political ethics—that is, between virtue and politics. Knowing how to live well is the condition for knowing how to rule the polis. Plato, in this respect, locates the private within the dynamics of the soul itself; the very harmony that is reached by balancing the parts of the soul makes a man just. Plato speaks of this interior justice precisely because he believes that there is no principal difference between private and public justice; balancing the soul has a generalizing effect, representing in miniature what it takes to live together in the polis. Plato explains that "the just man in his turn, simply in terms of his justice, will be no different from a just city. He will be like the just city."²⁹⁹ Ultimately, for Plato, the condition for justice lies in the possibility of controlling the three parts of the soul—the rational part by being wise, the appetitive by being temperate, and the spiritual by being dignified.

The process of thinking about justice takes place within an institutional setting, however: within the legal boundaries of the city. This is the second Platonic

elaboration of the distinction between public and private, embodied in his writings by the images of the philosopher and the city. The central issue of this distinction is well described by Michel Foucault, namely, “how philosophical truth and moral virtue relate to the city through the *nomos* [law, GD].”³⁰⁰ The tension between truth and law is, of course, perfectly embodied by the person of Socrates. Being a natural philosopher, whose truth-telling is independent from power and interests (family ties, economic bonds, and state interests), Socrates thinks and speaks of the ideal city. He seeks to bring his conscience in tune with the Forms that define justice itself.³⁰¹ Socrates is a private man, a nonconformist, whose sole concern is to be a *parrhesiastes*, a man of truth.³⁰² Socrates thus states in the *Apology*: “It is necessary that one who really and truly fights for the right, if he is to survive even for a short time, shall act as a private man, not as a public man.”³⁰³ And to strive to act justly as a private man also implies the courage to defy the city and its laws for the sake of truth and justice.³⁰⁴ As Plato puts it in *The Laws*: “What is required, in all probability, is some daring human being who by giving his unusual honor to outspokenness will say what in his opinion is best for the city and the citizens.”³⁰⁵ Even if these collisions between man and law are exacting, they are also vital. The city cannot do without men who dare to speak the truth.

But Socrates is also a great admirer of the united city. He demonstrates his allegiance to the polis by answering in the affirmative Glaucon’s rhetorical question as to whether “the best-regulated city is the one in which the greatest number of people use this phrase ‘mine’ or ‘not mine’ in the same way about the same thing.”³⁰⁶ He personifies the problematic relation between public law and private truth.³⁰⁷ Socrates’ ambiguous position is dramatized to the full when, given the option by Crito to escape the death penalty, he gives his obedience to public law as the highest oath of loyalty a citizen can make.³⁰⁸ Indeed, Plato shows how Socrates represents the dual interpretation of the distinction between science and politics. As a philosopher, he discerns the ideal forms that make up men’s horizon, and he is free to do so; yet, as a citizen, he recognizes that having this freedom also means consenting to be a legal subject.³⁰⁹ Although truth and law might harmonize in the mind of the philosopher king,³¹⁰ the actual actions of the street-level philosopher expose the tragic relation between them, which may even end in his acceptance of the death penalty. Plato draws a sharp line right through the science/politics distinction: even though there is no principal difference between practical wisdom on an individual (ethical) and on a political scale, acting virtuously, or deliberating wisdoms can bring a private citizen into conflict with public law.

At this point, some modern scholars say: behold Plato, the notorious rationalist, being rigid in his oath to the world of Ideas.³¹¹ Such a reaction would be reinforced by, for instance, Plato’s skeptical sketch of the artist.³¹² Yet Plato—author of such magnificent literature himself—did not hate art; he was concerned only about the menace of art being made public. In his desire to produce beauty, the artist (or the

philosopher) easily acquires a manipulative force at a public level, which may lead to the disintegration of the city. Plato was not particularly confident in the sanity of public opinion, contending that the public itself is the greatest sophist: “With justice and beauty, lots of people might settle for the appearance of them. Even if things really aren’t really just or beautiful, they might choose to do, possess or think them [so] anyway.”³¹³ Plato tells us that publicizing beauty or truth can be a dangerous thing to do and is only reserved for the excellent. To have a grasp of things and to explain it is not the easiest thing to do; and even for one who has mastered this, actually doing so in public may lead to the fate of Socrates.

Plato is no enemy of the open society;³¹⁴ quite the opposite, since he is well aware of the great discrepancy between theory and practice for the sake of which he deems an analysis of the public/private distinction so crucial. Plato is wary of the tyranny of the majority, a phenomenon that comes along with democratic participation.³¹⁵ Plato’s democratic skepticism, ironically, makes Socrates seem an idiot not only in front of the law but also in front of the common man, considering how bluntly he confronts the bigot in the agora. By explicating Socrates’ paradoxical positions, Plato tries to deal with political complexity; and such an assessment demands taking on some radical positions that Socrates personifies. Saxonhouse explains Plato’s position very aptly:

While many have taken Socrates’ proposals here as serious, as a rationalist vision of an ideal polity, it seems to me that Plato is rather suggesting the ludicrous extremes to which politics must go in order to transcend the eternal conflict between public and private, the extreme distortions of nature which politics must perpetrate in order to secure its existence.³¹⁶

This implies, more specifically, a need to acknowledge politically at least two levels of the public/private distinction: an ethical distinction, within the soul, and a political distinction, within the polis.

6.4 Aristotle: The scope of political commonality

Aristotle confronts the Platonic public/private distinction and takes it a big step further. He examines the internal state of the soul by distinguishing types of rational knowledge, and he further develops the relation between ethics and politics by posing the question of political management. Aristotle’s basic point is clear: practical knowledge (or wisdom) is concerned with human functioning, and happiness is its ultimate end. Like Plato, Aristotle states that because political knowledge is concerned with human action and living well, this type of knowledge rests most heavily on practical knowledge.³¹⁷ “The student of politics, then, must study the soul”³¹⁸ in order to perceive “what sorts of thing conduce to the good life in general.”³¹⁹ The goal of political theory (or science, as Aristotle calls it) is to

understand how citizens become virtuous and how they communicate their virtues so that laws can be devised and preserved “[u]nder which anyone might act in the best manner and live blessedly.”³²⁰ Moreover, political theory needs to study how politicians can legislate in order to foster this spirit of proper human functioning.

Aristotle is keen to find out how to deal with the potential tragedy between practical and political wisdom that Plato depicted. Much more of a political scientist than Plato, Aristotle is concerned with building and preserving the polis rather than merely understanding its ideal form and potential hubris—intrinsic tensions. He wants to connect the virtues of both ruler and philosopher without heading towards an all-out confrontation. While Aristotle holds on to both Platonic distinctions (ethical and political) between private and public, he looks for ways to appease the ambitions of virtue and law. The central question is how to politically institutionalize virtue or knowledge. A political regime can be constituted and organized only if it is clear what knowledge citizens can share how, and to what degree. To Aristotle, then, it is perfectly natural to think of the city from a public point of view, for “to be partners in nothing is impossible.”³²¹ The city is a *koinonia*, a place where people share things; if they had nothing in common, civilization would not be possible in the first place.³²² In this respect, then, the city can be called a natural habitat for man.³²³

Aristotle however stresses that because the good is volatile and only becomes real in the course of action, the political theorist should look not for an ideal of goodness but for “a way of life which it is possible for most to participate in, and ... most cities can share.”³²⁴ Similar to the individual who searches for a practical mean in his life, this kind of politics has the object of finding a mean according to which citizens can develop themselves in the best possible way. “The master of any art avoids excess and defect, but seeks the intermediate and chooses this—the intermediate not in the object but relatively to us.”³²⁵ It can be said that politics should create an environment in accordance with this rule of thumb.

The connection between knowledge and politics, according to Aristotle, is vital. Both the politician and the political scientist ought to be men of the world who understand the world in its many aspects.³²⁶ Without having a rich life experience, they would have no idea what they were talking about, let alone the capacity to relate ethics to politics.³²⁷ Aristotle stresses throughout his work that, because the good concerns an optimal *activity* of the soul, its very Idea cannot be represented by a *term* that denotes something substantially in reality.³²⁸ The good’s offspring appear in the moment; they cannot be written down without losing their particular meaning.

According to Liesbeth Huppel-Cluysenaer, Aristotle is one of the first, if not the first, formulators of the epistemic problem: the impossibility to describe the individuality of things.³²⁹ Aristotle makes a strict distinction between talking about the good and actually doing and experiencing it. Although people have an

intuitive idea of goodness that they can narrate and describe, he writes, the very truth of goodness lies, in the end, in the activity itself: “of honour, wisdom, and pleasure, just in respect of their goodness, the accounts are distinct and diverse. The good, therefore, is not something common answering one Idea.”³³⁰ Instead, the good only appears in the mind and can be particularly experienced in practice. Put differently, although words acquire meaning only in the context of application, contextual knowledge, in its turn, cannot be contained within the words. This implies that actions can only symbolically or incoherently be connected to rules of the practice in which these actions fall. The semantic gap between words and their practical meaning is inherent. Rationality is concerned with potentiality, yet is highly limited in realizing it. The irony, then, is that although practical knowledge and political knowledge have the same quality, the contingency of goodness makes politics extremely limited in actively promoting and realizing goodness. The ideal of political unification is limited therefore.

6.4.1 *The inexpediency of progressive political unification*

With Aristotle’s take on Plato, we have arrived at the dual task of politics as jurisdiction: investigation and authority. Political *theory*, in this respect, is, in Aristotle’s words, of a “controlling kind,”³³¹ a “supreme and comprehensive science.”³³² In our terms, political theory is a third-order construction: it studies the authoritative organization of democratically institutionalized knowledge.

As we have seen in Chapter 4, however, judging the *scope* of politically sharing knowledge is a whole different matter.³³³ Although striving for unity is a normal and necessary ambition for the city, it does not automatically imply the goal of progressive political unification.³³⁴ The need to share knowledge politically is clear, but Aristotle doubts whether it can be stated in advance that “it is best for the city to be as far as possible entirely one.”³³⁵ Aristotle believes that the process of political unification must be strictly tempered if the political body in question wants to remain a city at all.³³⁶ The greater the number of people involved in a “partnership,” the more complex the unifying process becomes. The individual is a more unified entity than a household, while a household is more unified than a city can ever be.³³⁷

To exemplify the idea, Aristotle assumes a city to be truly unified in, for instance, a situation where children are common property (referring Plato’s *Republic*), such that all men can say of any boy in the city, “This is my son.” To Aristotle, this statement is nonsense and has a merely formal significance. It suggests that what each male member of the group means is something more like, “This boy is like a son to me”; the public spirit, so to speak, determines their individual emotions concerning the child. Yet only one man can actually say that the boy is *his* son. Therefore, if Socrates wants to hold on to his conjecture that a common interest in children is a sign of true unification of the public, he needs to show that

an artificial group of fathers is actually a better caretaker than an individual father; and, Aristotle adds, this needs to be shown not only for the one child, but for all of them in the city. Aristotle is convinced that this is not true at all: “What belongs in common to most people is accorded the least care: they take thought for their own things above all, and less about things in common, or only so much as falls to each individually.”³³⁸ Common care of children will not enhance the happiness of the city, nor of the children themselves. “Each of the citizens comes to have a thousand sons, though not as an individual....”³³⁹

With this argument, Aristotle points precisely to the difference between talking about the good and knowing it: or, to put it differently, to the inexpediency of strong political unification, due to the inherent limit of epistemic sharing. Although there is a wealth of knowledge concerning the raising of children, raising a child properly, in the end, can be done only from a basis of practical knowledge of the child itself. Generalizing non-explicit knowledge (as a zero- and first-order construction), stripping it from context, will do injustice to the particular subject the knowledge is concerned with (i.e., the specific child). Here a political argument for the privacy of parenting arises out of an epistemological argument. Not the polis but a lower stratum of human organization (the family) may prove to be better providers of unity, owing to the superiority of its care-taking virtues to those of an artificially unified multitude. Aristotle’s point is that the *idea* of “common children” doesn’t mean anything until it is actually put into practice, and experience overwhelmingly shows that indeed the value of taking care of children is generally better realized in compact rather than in large environments.

Aristotle’s example is a plea for a city build on self-sufficiency. He is convinced, in the words of Saxonhouse, that “there must be a private realm which retains respect and support if there is to be a viable public realm.”³⁴⁰ To be sure, this implies not just a degree of civil autonomy for institutions like families or corporations, but also for the individual. As Plato already indicated, virtue needs proper and careful development by the individual as well, for in the end only the individual can optimally judge situations in which he acts.³⁴¹ Put differently, the importance of institutions and individuals leads Aristotle to argue for two types of civil self-sufficiency for the sake of limiting progressive political unification. The scope of political commonality, however, is also determined by understanding the specific knowledge involved in civil practices of will formation. As both Plato and Aristotle have made clear, becoming political requires knowledge of one’s soul. An understanding of the human faculty of knowing is the basics of both ethics and politics.

6.4.2 Three forms of rational knowledge

As a consequence of the epistemic problem, Aristotle distinguishes between non-rational knowledge and rational knowledge. Using knowledge in the course of action

is very different from thinking or talking about it. Sharing knowledge sometimes means sharing *rational* knowledge, knowledge as a second-order construction. But to share knowledge politically *often* means to share rational knowledge, as the real-time, face-to-face situation is absent in political abstraction. Politics is a third-order construction.

From a rational point of view, however, there are great differences involved in sharing different types of information. It is very different to share rational knowledge about how to raise children than about how to construct a highway. The former is more difficult than the latter. From a rational point of view, it is easier to build and manage a highway than it is to raise and educate children. Children are unique, growing creatures, more particular than a highway will ever be. A different political outlook is thus needed for each activity, since different types of knowledge are involved.

Aristotle distinguishes between two forms of rational knowledge (second-order constructions³⁴²): theoretical³⁴³ and calculative.³⁴⁴ Calculative knowledge is further divided into the categories of technical knowledge and practical knowledge. These three *intellectual* virtues (or rational parts of the soul) run analogously to three human activities: thinking, producing, and acting. In contrast to theoretical knowledge, both technical and practical knowledge are concerned with the variability and contingency of reality. Theoretical knowledge, in contrast, deals with the *invariability* of reality, with finding out its fundamental principles, independent of human action. Theoretical knowledge has no practical consequences and no utility outside itself.³⁴⁵ Man's happiness has no part in it. The object of theoretical knowledge is contemplation, thinking about reality itself.

Technical knowledge is instrumental knowledge. It deals with understanding the means that achieve a certain result—such as building a chair or baking a pie—that can be reproduced if necessary. The object of technical knowledge can be precisely defined and easily reconstructed in theory: by carefully following the instructions, it should be possible to actually bake a pie, or to build a chair. Technical knowledge is in principle easily shareable, although of course it can become very complex (building a quantum computer, the Space Shuttle or the Large Hadron Collider), while the end result will always depend on other, less “accurate,” circumstances and factors, such as natural circumstances or a personal “feeling” for the object at hand.³⁴⁶

Practical knowledge deals with acting well. Rationalizing acting well is quite artificial, since it cannot be straightforwardly applied to situations. The “proof” or “truth” of practical knowledge lies in the action itself; it is intricately connected with the particular context. Hence, Aristotle states, practical knowledge studies things that are good, “but these are the things which it is the mark of a good man to do, and we are none the more able to act for knowing them if the virtues are states of character.”³⁴⁷ In contrast to technical knowledge, then, practical knowledge

cannot be scientifically proven or copied.³⁴⁸ The verdict of a good action lies in the action, and changes with the situation in which it is performed. Hence, “acting well or doing good” can be defined only generally, as something like “an activity of the soul which follows or implies a rational principle [*logos*, GD].”³⁴⁹

Accordingly, practical knowledge is difficult to share—which of course is not to say that practical knowledge should not be shared. Sharing practical knowledge depends on narration, demonstration, and illustration. Indeed, it has a *symbolic* quality to it: it can be reconstructed and exemplified, yet not empirically proven.³⁵⁰ Thinking of how to use practical knowledge requires, as Huppes-Cluysenaer puts it, a “mental reconnaissance,” that is, “imagining the basic case while varying particular characteristics and inquiring which variation would make a certain kind of conduct [appropriate].”³⁵¹

Technical knowledge is quite different from practical knowledge. It deals with understanding the means that realize a concrete end, or, more generally, that realize the conditions that bring about certain consequences.³⁵² The activity of producing is different from the product itself; it is instrumental to it.³⁵³ The proof of producing *well*, in other words, lies in reconstructing the means towards the end, to see if they have caused the wished-for result. Although practical knowledge is also concerned with a goal (acting well), the goal is delineated by the action itself. In reality, of course, both types of knowledge run through each other all the time: production cannot be independent of the knowledge of how to do things in particular situations, while practical knowledge cannot do without the technical knowledge about certain facts concerning the circumstances (e.g., weather, food, money) that influence practices.

Theoretical knowledge is unlike technical or practical knowledge. It is concerned with the reality that is independent of man’s existence. Theoretical knowledge considers not the human action of production but reality itself. It is natural knowledge (mathematics, physics, metaphysics), whose truth is independent from the human praxis and thus has no direct utility. Politically speaking, theoretical knowledge is less important because political happiness is concerned with human accomplishment.³⁵⁴ Utterly incompetent men can have the brightest minds—think of the image of the clumsy, absent-minded professor. Aristotle writes that

while young men become geometricians and mathematicians and wise in matters like these, it is thought that a young man of practical wisdom cannot be found. The cause is that such wisdom is concerned not only with universals but with particulars, which become familiar from experience, but a young man has no experience, for it is length of time that gives experience....³⁵⁵

This, of course, does not mean that theoretical knowledge does not play a role

in these activities. Theoretical knowledge can be used for all kinds of purposes, thereby becoming technical knowledge, such as knowledge on the laws of gravity or algorithms. However, theoretical knowledge *itself* does not produce political happiness or unhappiness, for it merely theorizes the mechanisms of reality.

For Aristotle, as I said earlier, political wisdom is concerned with how to share knowledge about proper human functioning from a rational point of view, especially regarding production and practicality. To appreciate the scope of political commonality, it is thus essential to distinguish between the types of knowledge I detailed above. It is generally easier to share technical knowledge than practical knowledge because its goal (and result) can be externalized; the public can discuss it much more precisely (for instance, ecological problems, the construction of a building, or the arsenal of an army). The more exactly a particular goal and its causes can be operationalized, the easier it is to share that knowledge. In today's terms, we would say that the empirical coherence of technical knowledge is high, while that of practical knowledge is low. Teaching someone how to boil water is easier than telling him or her how to become a happy-go-lucky person.³⁵⁶ The latter is context-dependent and very hard to empirically operationalize.

Technical knowledge is not just easier to share, it is vital for survival, Aristotle emphasizes. One needs to have the basics right in order to become a well-functioning human being. This suggests coordination and collaboration, and a form of collectivity as well. Man's life depends on the city, for one "who is without a city through nature rather than chance is either a mean sort or superior to man...."³⁵⁷ Man is a political animal by natural necessity.³⁵⁸ "[O]ne's own good cannot exist without household management, not without a form of government."³⁵⁹

The city is the basis of social life; citizens need the polis to share life itself, "for without the necessary things it is impossible either to live or to live well."³⁶⁰ Still, although the city comes "into being for the sake of living, it exists for the sake of living well."³⁶¹ Humans feel pleasure and pain, like animals, and voice these emotions. But because they are gifted with speech (*logos*), they are able to discern what is good or bad, just or unjust. As humans we cherish the good life as the experience of mastering our character in the light of striving for the good—"and partnership in these things is what makes a household and a city."³⁶² In human practices we value and admire people therefore not so much for the skills and techniques they have mastered, but above all for the way they have developed their character all along. To have perfect technical control over life itself is only a limited reward.

6.4.3 Two types of civil self-sufficiency

The possibility of *rational* sharing knowledge depends on the epistemic quality of sharing. The question is what knowledge is involved (technical, practical, or theoretical). As we already have seen in Chapter 4, *politically* sharing rational

knowledge is even more limited, not only because of the inherent qualities of knowledge itself, but also because political knowledge has a specific object, namely, to govern practices *in which* different types of knowledge are used and shared. Sharing political knowledge occurs by means of the authoritative regulation of the institutionalization of practices, which can only be done abstractly and loosely. From a political perspective, political governance requires respect for a certain organizational autonomy. A relatively self-sufficient civil context of will formation is crucial for any knowledge to be acquired and shared.

Aristotle thus rejects the ideal of progressive unification, arguing that the purpose of building the city is self-sufficiency (*autarkeia*).³⁶³ He formulates his mission statement as follows: “A city is the partnership of families and villages in a complete and self-sufficient life. This, we assert, is living happily and finely.”³⁶⁴ The decisive reason for civil self-sufficiency is the insight as to what a good life requires, which is a liberty of action, a sense of reality, and a strong character.³⁶⁵ These qualities are the conditions for virtuous action.

Aristotle distinguishes between two forms of self-sufficiency on the basis of two qualifications of the polis. Political wisdom tells us that to rule human association and to increase human happiness means to have insight in dealing with civil self-sufficiency, seen from the perspective of the political values of *institutional plurality* and *human pluriformity*. Respecting civil self-sufficiency is basic of politics, since “it is evident that as [the city] becomes increasingly one it will no longer be a city.” According to Aristotle, the city is a cooperative plurality consisting of many smaller forms of cooperation (families, villages, regions, corporations) that function perfectly well on their own in many respects. Too much striving for political unity, Aristotle writes, would destroy institutional plurality and ultimately society as a whole:

The city is in its nature a sort of multitude, and as it becomes more a unity it will be a household instead of a city, and a human being instead of a household; for we would surely say that the household is more a unity than the city, and the individual than the household. So *even if* one were able to do this, one ought not do it, as it would destroy the city.³⁶⁶

Another reason for civil self-sufficiency is that the polis is “made up not only of a *number* of human beings, but also of human beings differing in *kind*; a city does not arise from persons who are similar.”³⁶⁷ Hence, the polis is not only a body of many different *practices* of will formation, but of many different *individuals* as well. Every human being is distinct, Aristotle stresses, a particular individual unlike any of his human fellows.³⁶⁸ Practical wisdom tells us, therefore, that understanding someone means taking seriously his particularity, even though doing so is very difficult. If the ideal of virtue is that individuals should prosper, it is crucial to

respect human pluriformity. Since virtue lies in the activity itself, political legislation needs to incorporate the distance between the law that *symbolizes* general practical knowledge and the practices in which people put it to active use. In the end, a man can claim to have attained practical knowledge if he “ceases to inquire how he is to act when he has brought the moving principle back to himself and to the ruling part of himself; for this is what chooses.”³⁶⁹ And this is exactly why acting virtuously is essentially private, according to Aristotle.

Aristotle concludes that “the more self-sufficing a community is, the more desirable is its condition, [and] then a lesser degree of unity is more desirable than a greater.”³⁷⁰ Political legislators need to keep in mind the fact that the more public the scope of their action, the more difficult it will be to share knowledge, and hence the more important it becomes to understand, preserve and respect civil self-sufficiency. Respecting the private exercise of virtue in a civil context is fundamental to political wisdom. The values of institutional plurality and human pluriformity suggest a reproof to the political ideal of progressive unification.

6.4.4 Politics: Sharing and managing knowledge

Returning to the modernist interpretation of the Greek public/private distinction, it is clear that Constant’s opposition between modern and classic liberty will not do. Plato is well aware of the intricate lines of the public/private web within the polis. He shows the effect of the psychological dynamic between ethics and politics within a greater juridical setting. Aristotle differentiates the two Platonic public/private distinctions to get a better grip on these dynamics by examining the virtues of the soul (types of knowledge) in relation to the task of politics. Aristotle’s conception of the public/private distinction is much more complex than Constant’s depiction of Greek political theory. He differentiates between three types of knowledge, on the one hand, and two types of self-sufficiency, on the other. The ethical public/private distinction is about sharing three types of knowledge, while the political public/private distinction is about how to deal with that exchange from the viewpoint of civil self-sufficiency.

Constant’s dichotomy, however, is still very influential. From that perspective, one is inclined to interpret the distinction between technical and practical knowledge *morally* and to translate it analogously as a public/private distinction that stands for private and public preferences. This is done by Habermas, for instance, who (influenced by Kant and Marx) distinguishes between “preference” (strategic) and “value” (moral).³⁷¹ In this respect, Habermas portrays the private as the place of preference maximization and the public as the place where such preferences are translated into values by democratic deliberation. Many scholars use this moralistic notion of politics, for instance exemplified by Jon Elster’s market/forum opposition.

But the moralistic notion of politics is a modernist error. To relate the

private to technical matters and the public to moral matters undoes Aristotle's differentiation of politics. The Aristotelean private/public argument concerns not differentiating private self-interest from public reason, but differentiating what can be epistemologically shared from what cannot. Hence, religion is a private activity precisely because belief has an intrinsically private quality to it. And, as already argued in Chapter 4, this does not imply that religion has no political meaning (as in neo-liberalism) but that the private (irrational) aspect of religion needs to be incorporated in the political discussion. The same goes for all activities in which irrational aspects play an important part.

Instead of understanding morality as a way of doing things in a given context, Elster sees morality as a discursive activity between people, with the object of becoming reasonable and transcending private interests. The result is two very different ideas of politics. Aristotle understands political sharing not as a value in its own right but as a necessity for human cooperation and survival. Politically sharing knowledge about good actions is important, but it is not the prime condition for acting well. Morality is best attained in private. Aristotle starts with individual action, and only then wonders how ethical know-how can be institutionalized (shared). As Swanson puts it: "It's wrong thinking that Aristotle believes that human beings fulfill themselves qua human beings only by way of speech and rational action and thus that a political philosopher seeks the conditions most conducive to them."³⁷² The moderns, however, start with public reasoning—that is, rationally sharing moral knowledge, which is the condition for acting well and having an idea of the good in the first place.³⁷³ Aristotle, notably, considers the private to have practical qualities as well, while technical matters are also a vital part of the public. The Aristotelean public/private distinction does not run parallel to the technical/practical axis, then, but stands squarely on it. The result is not a simple translation of the pairs, but a double combination. Both technical and practical knowledge have a private and a public side: agricultural techniques, for instance, can be applied both in the household and in the polis.

The Aristotelean public/private distinction offers political commonality as its goal, on both a technical and a practical level, which addresses the complexity of running a city but, from the perspective of institutional plurality and human pluriformity, doing so without destroying the specific quality of civil practices of will formation. The issue of political sharing should be answered by examining, first, the type of knowledge involved and, second, the degree of self-sufficiency that can be given to the civil practice in question. The activity within a specific practice, not the private or public setting itself, is what makes something more or less political. The political management of different sort of human activities depends on distinguishing their epistemic purpose (producing/acting) and their mode (private/public).

Having political knowledge of how civil associations operate, then, does not

imply a promotion of paternalistic politics. Contrary to many misapprehensions,³⁷⁴ Aristotle does not believe that law should, in the words of Swanson, “command the performance of substantive actions but [should instead] stipulate subscription to the qualitative conditions of civil association.”³⁷⁵ The fact that the individual good is dependent on the political good on certain occasions (such as providing for collective goods) is not the same as saying that the political good determines the individual good. The political conditions of institutional plurality and human pluriformity should provide for the appropriate standard of civil will formation.

6.5 Conclusion

Aristotle’s political theory keeps the liberal idea of pluralism intact more successfully than liberalism itself.³⁷⁶ Aristotle highlights the importance of the private (non-political) status of will formation, but he supplements it with an intrinsic notion of will formation by emphasizing the importance of virtuous excellence and practical wisdom. That additional emphasis marks the difference from social-choice theory, which focuses instead on rational behavior. Aristotle, however, is skeptical about sharing rational knowledge in the first place. Moreover, he opposes a minimalist state, for “the city is not a partnership in a location and for the sake of not committing injustice against each other and of transacting business.”³⁷⁷ The polis exists for the sake of living well, which implies that social entities should be facilitated in their efforts to lead a complete and self-sufficient existence. We can conclude that that is why processes of will formation ought to be defined as “private.”

Elster, as we know, rejects social-choice theory (or liberalism) for this reason. He claims that a description of democratic will formation as private does not take seriously the fact that there are many processes that limit, change, or manipulate preference formation, thereby preventing people from expressing their “real” wishes. Social-choice theory lacks a substantive criterion for accepting or selecting preferences — “it essentially lacks openness”³⁷⁸ — and hence does not take seriously that expressed preferences often differ from real preferences. People need to be taken seriously as citizens and challenged to think critically about what they want. For Elster, public deliberation — undertaken for the goal of democratic will formation — solves the problem of distorted preferences. But this understanding seems to suggest that civil will formation takes place without more personal moderating mechanisms such as criticism, reflection, and monitoring. Such a skeptical attitude towards private morality would be quite unfamiliar to Aristotle. The question, moreover, is how public deliberation will provide substantive criteria for preference expression and will formation, since Elster (along with Habermas and Rawls) stresses that disputes cannot be settled by way of an *intrinsic* consensus. Instead, Elster refers to public proceduralism, in which substantive criteria should be embedded in the conditions of deliberation itself. We have seen this in Chapter 4 as well, in which we distinguished between public justification and ideas of the

world. It is highly doubtful whether public proceduralism would help citizens handle their social practices.

Gaus explains this problem well. Although he defends the public use of reason, he admits that ultimately only a few principles can be, in his terms, conclusively justified, because “most of our specific moral disputes result in epistemological standoffs.”³⁷⁹ And while the principles that are conclusively publicly justified (such as those of toleration, free speech, and privacy) have “exclusionary force—they exclude some possible norms as permissible—it must be acknowledged that they often provide little in the way of positive guidance.” According to Gaus, then, taking public deliberation as ultimate substantive guidance would result in *another* state of nature, in which “[i]nconsistent interpretations of each other’s rights and responsibilities would lead to conflict and thwart the development of settled expectations.”³⁸⁰ Gaus argues for resolving the deadlock by means of a specific mode of *political justification*, directed towards the adjudication of public disputes that have been inconclusively justified. At the heart of this mode of justification lies the concept of the rule of law, which he sees as “the definitive voice of public reason.”³⁸¹ Thus, due to the vagueness of the procedural principles of deliberation, Gaus radically narrows down the purpose of politics so that it serves merely to adjudicate conflict through the rule of law. This makes his conception of politics quite different from the deliberative one.

Gaus’s analysis confirms the importance of distinguishing between the civil and the political levels of democracy, between will formation and jurisdiction (or adjudication). But it also substantiates the need for a strong theory of democratic will formation *in addition* to the idea of politics as jurisdiction. After all, Gaus’s conception of political justification as adjudication is clearly only one aspect of politics as jurisdiction. We may agree that the rule of law is *ultimately* adjudicative, but it is certainly not *primarily* so. If, say, two individuals have an insoluble conflict, then adjudication may seem to be the only solution; yet, most of the time, things will not go that far. It is precisely for this reason that the rule of law provides particularly for *civil law*, not for *public right*. Politics as jurisdiction organizes and facilitates civil practices and institutions so as to indirectly accommodate and facilitate subjects to mind their own business yet still to cooperate virtuously with each other. Indeed, in this sense, politics as jurisdiction is supplemented by the virtues of civil democracy, since providing law (legislating), which is the main task of politics, can only be done with intrinsic information about will formation processes. Indeed, much of law (still) consists of civil law, which is not imperative (or administrative) but regulative (or facilitative). Private law can be called “intrinsic” because it deals with institutional plurality and human pluriformity. And coming to grips with both these values is where politics and democratic will formation—or, in Aristotle’s words, political and practical wisdom—meet.

(Notes)

²⁸⁵ “Agamemnon is told by the prophet that if he does not offer up his daughter as a sacrifice, the entire expedition [sailing for Troy, GD] will remain becalmed.” M.C. Nussbaum ([1986], 1989) *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, p. 34. Henceforth: *Fragility of Goodness*.

²⁸⁶ A.W. Saxonhouse (1982) “Classical Greek Conceptions of Public and Private,” p. 370. Henceforth: “Greek Conceptions.”

²⁸⁷ Around 430–431 BC, as chronicled by Thucydides. The speech was a remembrance of the soldiers who died in the first year of the Peloponnesian War.

²⁸⁸ Sabine, *History of Political Theory*, p. 12.

²⁸⁹ “I would have you day by day fix your eyes upon the greatness of Athens, until you become filled with the love of her....” Pericles cited in: *ibid.* Cf. Nussbaum, *Fragility of Goodness*, pp. 373–374. Sabine, *History of Political Theory*, p. 12.

²⁹⁰ Saxonhouse, “Greek Conceptions,” p. 374.

²⁹¹ *Ibid.* Cf. Arendt, *Human Condition*, nt. 16, p. 17.

²⁹² Cited in: Sabine, *History of Political Theory*, p. 17. Aristotle remarks: “That is why we think that Pericles and men like him have practical wisdom. They have the capacity of seeing what is good for themselves and for mankind, and these are, we believe, the qualities of men capable of managing households and states.” Aristotle, *Nicomachean Ethics*, 1140b9–10.

²⁹³ “Probably it is true that the Greeks would not have turned to philosophy, at least in the manner they did, had the life of Athens remained as happy and as prosperous as it seemed to be when Pericles’ Funeral Oration struck its dominant note.” Sabine, *History of Political Theory*, p. 25. But see for a different view: X. de Win (1980) “Introductie,” pp. v–x. Cf.: Arendt, *Human Condition*, p. 17, nt. 16.

²⁹⁴ Plato, *Republic*, 344e.

²⁹⁵ Cf. Aristotle, *Politics*, 1323a14–16: “Concerning the best regime, one who is going to undertake the investigation appropriate to it must necessarily discuss first what the most choiceworthy way of life is.” See also: *ibid.*, 1323b33–35. Cf. Aristotle, *Nicomachean Ethics*, 1140a10.

²⁹⁶ Plato, *Symposion*, pp. 239 ff.

²⁹⁷ “It is hard for people to see that this is the only route to happiness for a city in its arrangements for the public and private life of its inhabitants.” Plato, *Republic*, 473c–e.

²⁹⁸ To be sure, classical philosophy was all but the specialized conception of what we understand philosophy to be nowadays; it was physically, ethically, and metaphysically oriented.

²⁹⁹ Plato, *Republic*, 434b; see also 434e, 435c, 441c. According to W.K.C. Guthrie, this statement resembles Aristotle’s words that justice is complete virtue because it involves virtue towards others as well. See W.K.C. Guthrie ([1975], 1980) *A History of Greek Philosophy: Plato, the Man and His Dialogues, Earlier Period*, vol. 4, p. 435. According to Guthrie, “The Republic” is an ill-chosen title; “On Justice” or even better “On the Just

Man” are titles that come closer to the original title. Guthrie, *History of Greek Philosophy*, p. 434, nt. 1.

³⁰⁰ Foucault, *Fearless Speech*, p. 104.

³⁰¹ See Moore, *Privacy*, pp. 151.

³⁰² Foucault, *Fearless Speech*, pp. 91-105.

³⁰³ Plato ([ca. 380 BC], 2003) *Apology*, 29e. See also Plato, *Republic*, 433b, 441d, 443d. It could be argued that Socrates anticipates Aristotle and considers just acts only to be possible if executed relative to the concrete situation, which can only be done by a private man. Cf. Swanson, *Public and Private*, p. 2 (on Aristotle). “If the activities promote virtue uncompromised by prevailing morality, then the place is private.” Cf. Moore, *Privacy*, pp. 121-122, for quoting this fragment in full, and p. 157 for a referral to Aristotle: “Aristotle, too ..., saw individual morality in a more generalized light as an important force to help form ideal political structures.”

³⁰⁴ In the *Apology* Socrates proclaims to the Athenian prosecutors Anytos, Meletos, and Lykon: “[I] thought it my duty to risk danger with law and justice on my side, rather than to be on your side for fear of prison and death.” Cf. M. Cranston (1968), “Introduction [to Rousseau’s *Social Contract*],” p. 39.

³⁰⁵ Plato ([ca. 360 BC], 1980) *The Laws*, 835c.

³⁰⁶ Plato, *Republic*, 461c, cf. *ibid.*, 464d: “Won’t our arrangements give them a single opinion about what belongs to them, give them the same goal to aim at, and make them all as nearly as possible subject to the same pleasures? [Glaucón asked]—They certainly will, [Socrates] said.” Cf. Aristotle’s comment in *Politics* on exactly this passage at 1261a17-19.

³⁰⁷ “Well, then, can we think of any greater evil for a city than what tears it apart and turns it into many cities instead of one? Or any greater good than what unites it and makes it one?” Plato, *Republic*, 462b.

³⁰⁸ “Think not of life and children first, and of justice afterwards, but of justice first, that you may be justified before the princes of the world below. ... Now you depart in innocence, a sufferer and not a doer of evil; a victim, not of the laws, but of men.” Plato ([ca. 360 BC], 1988) *Crito*. To be sure, Socrates refers to the failure of the men who have misinterpreted the law, not to the failure of law itself.

³⁰⁹ Cf. Saxonhouse, “Greek Conceptions,” p. 375.

³¹⁰ Plato, *The Republic*, 473d. See also Saxonhouse, “Greek Conceptions,” p. 375: “The private for him [Socrates, GD] now means a new family, which comes from philosophic discourse engaged in by his companions and followers.” Cf. Moore, *Privacy*, pp. 120-121.

³¹¹ For instance: “It is the myth that rationality consists in being constrained by rule. According to this Platonic myth, the life of reason is not the life of Socratic conversation but an illuminated state of consciousness in which one never needs to ask if one has exhausted the possible descriptions of, or explanations for, the situation. One simply arrives at true beliefs by obeying mechanical procedures.” Rorty cited in: J.P. Murphy (1990) *Pragmatism: From Peirce to Davidson*, p. 105.

³¹² Ironically, so poetically described by these words: “If you accept the honeyed Muse, in song or poetry, pleasure or pain will be twin kings in your city....” Plato, *Republic*, 607a.

³¹³ Plato, *Republic*, 505d-e, italics Plato. But “[w]hen it comes to things which are good, on the other hand, no one has ever yet been satisfied with the appearance. They want things that really *are* good; they all treat the appearance of it with contempt. ... That is what every soul follows.” Ibid.

³¹⁴ Cf. C. Lord ([1984], 1985) “Introduction,” p. 24: “The moderns have not only proven unable to lay to rest the human impulses that stimulate utopian thinking, but have themselves fostered forms of utopianism more virulent and more destructive of sensible politics than anything known to the premodern world.”

³¹⁵ Famously described in Book VIII of *The Republic*.

³¹⁶ Saxonhouse, “Greek Conceptions,” p. 377.

³¹⁷ Aristotle, *Nicomachean Ethics*, 1141b24 ff. See also Aristotle, *Politics*, 1324a5 ff.

³¹⁸ Aristotle, *Nicomachean Ethics*, 1102a17.

³¹⁹ Ibid., 1140a28-29.

³²⁰ Aristotle, *Politics*, 1324a23-24.

³²¹ Ibid., *Politics*, 1260b39-40.

³²² As Rousseau has put it so nicely: “[If] there were no point on which separate interests coincided, then society could not conceivably exist.” Rousseau, *Social Contract*, p. 69.

³²³ Which is not the same as saying, as liberals are tempted to say, that collective interests, according to Aristotle, necessarily dominate individual interests.

³²⁴ Both quotes: Aristotle, *Politics*, 1295a25-33. Cf. Saxonhouse, “Greek Conceptions,” p. 378: “How much is to be shared by the city and how much not?”

³²⁵ Aristotle, *Nicomachean Ethics*, 1106b6. Cf. *ibid.*, 1094b23-25.

³²⁶ Political leaders should be of the age of (at least) fifty, Plato says in *The Republic* (540a).

³²⁷ Aristotle, *Nicomachean Ethics*, 1094b11 ff.

³²⁸ Ibid., 1096a11 ff.

³²⁹ Huppel-Cluysenaer, “Individual Realism of Aristotle.”

³³⁰ Aristotle, *Nicomachean Ethics*, 1096b 24-26.

³³¹ Ibid., 1141b22.

³³² Ibid., but in the translation of Martin Ostwald.

³³³ Saxonhouse, “Greek Conceptions,” p. 365. Cf. Nussbaum, *Fragility of Goodness*, p.14

³³⁴ See P.L. Phillips Simpson (1998) *A Philosophical Commentary on the Politics of Aristotle*, p. 75. Henceforth: *Philosophical Commentary*.

³³⁵ Aristotle, *Politics*, 1261a14-15.

³³⁶ Ibid., 1261a19-25.

³³⁷ See also Phillips Simpson, *Philosophical Commentary*, p. 75.

³³⁸ Aristotle, *Politics*, 1261b33-34.

³³⁹ Ibid., 1261b38.

³⁴⁰ Saxonhouse, “Greek Conceptions,” pp. 378-379.

³⁴¹ See also Huppel-Cluysenaer, “Toward a theory of new natural law as a basis for future legal positivism.”

³⁴² In order to avoid terminological confusion, I will henceforth call the second-order level of construction “rational” instead of “theoretical.”

³⁴³ Also sometimes called “scientific” or “contemplative,” depending on which translation of *Nicomachean Ethics* one uses.

³⁴⁴ Literally “logistical.” See for this division also Plato ([360 BC]), *Statesman*, 259.

³⁴⁵ One has to apply it first, but then it becomes technical knowledge.

³⁴⁶ This theme is the backbone of Robert Pirsig’s *Zen and the Art of Motorcycle Maintenance* (1974). The main character, Phaedrux, distinguishes between the classic and romantic understanding of reality, a distinction that is similar to the distinction between *techne* and *phronesis*. Although Phaedrux has a preference for the classical point of view, he is convinced that an equilibrium is needed. To his mind, classical knowledge has become scientific. The love for the technique itself has been lost, “because there is no rational format for any understanding for scientific creativity.” (p. 297).

³⁴⁷ Aristotle, *Nicomachean Ethics*, 1143b24.

³⁴⁸ Ibid., 1097a15.

³⁴⁹ Ibid., 1098a7.

³⁵⁰ Ibid., 1141b22.

³⁵¹ Huppes-Cluysenaer (2004) “Individual Realism of Aristotle.”

³⁵² Technical knowledge can thus be perfectly supportive to practical knowledge.

³⁵³ Aristotle, *Nicomachean Ethics*, 1140b5.

³⁵⁴ Nevertheless, actually having theoretical knowledge (say, being blessed with a deep insight into string theory) certainly produces personal happiness, since it means that one’s soul is perfected by that knowledge. Ibid., 1143b18 ff.

³⁵⁵ Ibid., 1142a11-14.

³⁵⁶ Perhaps, then, it can be argued that the more technical knowledge is involved, the greater intervention in the private sphere might be possible—for instance regarding sanitation, defense, transportation.

³⁵⁷ Aristotle, *Politics*, 1253a3-4.

³⁵⁸ “[I]f the whole body is destroyed there will not be a foot or a hand....” Aristotle, *Politics*, 1253a19-21.

³⁵⁹ Aristotle, *Nicomachean Ethics*, 1142a8-10.

³⁶⁰ Aristotle, *Politics*, 1253b25. Plato also stresses this in *Republic*, 369. See also Rousseau, *Social Contract*, Bk. I, Ch. 2: “Man’s first law is to watch over his own preservation....”

³⁶¹ Ibid., 1252b29-30. Cf. Arendt, *Human Condition*, p. 183, nt 8.

³⁶² Aristotle, *Politics*, 1253a18 ff.

³⁶³ Ibid., 1252b27 ff.

³⁶⁴ Aristotle, *Politics*, 1280b40-1281a2.

³⁶⁵ Aristotle, *Nicomachean Ethics*, 1105a17-1105b11.

³⁶⁶ Both quotes: *ibid.*, 1261a16-22, italics GD.

³⁶⁷ Ibid., 1261a22-24, italics GD.

³⁶⁸ “[T]he substance of an individual is the substance which is peculiar to it and belongs to nothing else....” Aristotle ([350 BC], 1933, 1996) *Metaphysics*, 1038b10-11.

³⁶⁹ Aristotle, *Nicomachean Ethics*, 1113a5-7.

³⁷⁰ Aristotle, *Politics*, 1261b10-17.

³⁷¹ Habermas, “Three Normative Models of Democracy,” p. 23.

³⁷² Swanson, *Public and Private*, p. 217.

³⁷³ Rawls, *Theory*, Chapter 7.

³⁷⁴ See section 5.2.

³⁷⁵ Swanson, *Public and Private*, p. 96.

³⁷⁶ See also: *ibid.*, p. 8.

³⁷⁷ Aristotle, *Politics*, 1280b30-31, cf. *ibid.*, 1280a32.

³⁷⁸ Elster, “Market and Forum,” p. 21, citing Bernard Williams.

³⁷⁹ Gaus, *Justificatory Liberalism*, p. 179.

³⁸⁰ *Ibid.*, p. 183, for both quotes.

³⁸¹ *Ibid.*, p. 195.

CHAPTER 7

Public Relations: Three Modern Public/Private Distinctions

7.1 Introduction

In this chapter, I explain the birth of politics as will formation by setting out three modern conceptions of the public/private distinction. These distinctions can be understood as the subject's public relationships with existence (world), humanity (society), and authority (state). The historical development of these three notions of publicness can be traced from the late fifteenth century onwards (sections 7.2-7.4). In my analysis, I borrow gratefully from Habermas's magnificent *Structural Transformation of the Public Sphere*,³⁸² yet my trajectory will be more conceptual and less historic than his. I will, moreover, present some considerable criticism of Habermas, concerning his, ultimately, one-dimensional interpretation of modern publicness.³⁸³ Habermas's focus is on moral publicness; by following Kant's concept of the publicity imperative, he depicts the public use of reason as the moral underpinning of politics and the public sphere as the discursive platform for state legitimacy. I will argue, however, that a conceptualization of democratic politics needs to include equally *all* three aspects of "modern publicness"—that it cannot neglect its existential and political elements. Properly distinguishing between these aspects is a condition for an adequate understanding of politics as jurisdiction.³⁸⁴

Just as in Habermas's study, Rousseau and Kant play important roles in this chapter. My appreciation of them differs from Habermas's, however. Instead of emerging as the notorious political collectivist he is often taken for, Rousseau explains very well the distinctiveness of the three aspects of modern publicness. Rousseau's perspective on the interrelations between world (or what he often calls "nature"), society, and state gives his work depth. Kant receives serious attention here as well, since he has been the most rigorous in explaining the central idea of modern politics: the public use of reason. A concluding comparison between Rousseau and Kant will bring into perspective their different approaches to the three modern public/private distinctions, as well as the consequences for studying politics as jurisdiction (section 7.5).

7.2 The political public/private distinction: Man and authority

The first modern public/private distinction refers to the division between society and state. It is the political public/private distinction, which stands at the basis of politics as jurisdiction and was already introduced in Chapter 3.³⁸⁵ In this section, the distinction will be historically illustrated and further explained.

The modern distinction between society and state has been perpetuated as the

effect of a discussion about the justification of public authority that started during the early Middle Ages. This discussion changed in the course of the sixteenth century, when, alongside the justification of public authority, the issue of popular sovereignty entered the discourse. The central question became where, ultimately, sovereignty (or authority) resided: with prince or people? Two reinforcing processes accompanied this discussion: the development of a civil society and the emergence of the administrative state.

The modern process of the democratization of public authority started in most of Europe during the Reformation (and in Italy during the high Renaissance). The idea of the absolute transcendence of God caused a radical renewal of the grounds for the ruler's terrestrial sovereignty. In Protestantism a strict separation was made between religious and worldly affairs: the political sovereign was held solely responsible for the temporal order, while the church retained undisputed authority over the spiritual order.³⁸⁶ This distinction paved the way for an *administrative state*, a state focused on the maintenance of a temporal order by rational rules and positive law.

The theological-political discussion about the ruler's sovereignty went together with an actual process of state growth.³⁸⁷ French and Italian authors, at the end of the fifteenth century, came up with new techniques for governmental rule. They developed a conception of state rationality (*raison d'état*) in order to modify the traditional discourse on the immanent legitimacy of manorial power. Foucault calls the new concept "biopolitics" or "governmentality."³⁸⁸ Public authority needed to become more dependent on effective control and to acquire "the perfect knowledge of the means with which states form, strengthen and maintain themselves, and grow."³⁸⁹ The best-known text in this respect is Machiavelli's *The Prince* (1513), with its unequivocal advice to the prince on how to gain and hold onto power. The prince should radically diminish his reliance on immanent authority, Machiavelli argues, and strengthen his principality by investigating, influencing, and controlling the behavior of, and the relations between, his subjects (especially the upcoming capitalist nobility).³⁹⁰ This required the formation of general rules and rational governance. Absolutist power was necessarily compensatory for the loss of immanent authority. It led to a concentration of public might and corresponding governmental functions at the court and its administration.³⁹¹ What Habermas calls "representative publicness"³⁹² turned into what I will call "administrative publicness": "[t]he bureaucracy, the military (and to some extent also the administration of justice) became independent institutions of public authority separate from the progressively privatized sphere of the court."³⁹³ Administrative state authority differed from the old, Habermas explains, for it "no longer referred to the representative 'court' of a person endowed with authority but instead to the functioning of an apparatus with regulated spheres of jurisdiction and endowed with a monopoly over the legitimate use of coercion."³⁹⁴ With this development from representative to administrative

publicness, the political public/private distinction took shape. A distinction between the governing and the governed body emerged. As Habermas writes: “‘Private’ designated the exclusion from the sphere of the state apparatus; for ‘public’ referred to the administrative state that in the meantime had developed under absolutism into an entity having an objective existence over against the person or the ruler. The public (*das Publikum, le public*) was the ‘public authority’ (*öffentliche Gewalt*) in contrast to everything ‘private’ (*Privatwesen*).”³⁹⁵

During the seventeenth century, however, the depersonalization and rationalization of state authority became infused with a democratic discourse. Scholars (see below) started to suggest to replace immanent state authority and to connect it with the consent of the public. The state developed towards a modern government in which rationality became tied to public justification and deliberation. The process of democratization of state authority had two distinct phases. During the first, the relation between state authority and public *consent* was central. During the second, state authority was connected to the idea of a public *will*. The eighteenth-century idea of popular sovereignty differed from the older conception of the sixteenth and seventeenth centuries. The Protestant motive of popular sovereignty was not to *constitute* authority by a self-legislative public, but to *control* authority—to check it—via a constitution in which the public’s rights and privileges were laid down.³⁹⁶ State authority was corporatist, grounded not in every person being an equal member of the public but in the divine social body as a whole—in the words of Althusius, the *corpus universalis consociationis*. The social body carried old privileges and rights that were laid down in the constitution and represented by magistrates. Although bound by the constitution and publicly held responsible for abiding and respecting it, public authority was specifically granted with the authority to manage the temporal order on God’s behalf. The public, then, could certainly “decide” to resist and overthrow its government, but only if fundamental rights were violated. The early-modern resistance to absolutism thus did not turn into a full-blown democratic theory in which the reasons for resisting authority referred to a popular will.³⁹⁷ Government was not just an administrative extension of public sovereignty. It had a separate responsibility in maintaining public order—although still in the name of the public. The early-modern idea of popular sovereignty was based on a stricter division between state and society than that of the modern idea of popular sovereignty.

The modern element of popular will formation saw the light only with the connection between public authority and the general will.³⁹⁸ A first step was to individualize popular sovereignty.³⁹⁹ According to John Locke, the people transferred their natural rights to the public authority, which was held accountable accordingly.⁴⁰⁰ Locke individualized the legitimation of public authority by tying it to individual and not to corporate rights. Still, he did not tie individual rights to a general will. As Sabine explains: “Instead of a law *enjoining the common good* of

a society, Locke set up a body of innate, indefeasible, individual rights which *limit the competence* of the community and stand as bars to prevent interference with the liberty and property of private persons.”⁴⁰¹ Locke was not concerned with attaching state authority to the public sphere of a self-legislative citizenry, as philosophers of the later Enlightenment would do.⁴⁰² He was more concerned with legally binding state authority in its task of ruling society. Locke’s concept of consent referred to the government’s duty to rightly employ its temporal authority in the name of the people. A strong idea of jurisdiction was vital to uphold the social order.⁴⁰³ Locke was still very much influenced by the Protestant legitimation of state authority.

Jean-Jacques Rousseau and Immanuel Kant were the first to formulate the social contract voluntaristically. Notwithstanding the absoluteness of the contract, both men understood the constitution of the contract to originate from a *subjective* commitment. The notion of public authority became, therefore, radically democratized: connected to the idea of the general will, made up and represented by rational subjects. If the public was to politically constitute itself, it needed to establish a social contract that was unanimously shared. The novel idea behind the modern social contract was thus the simultaneous presence of civil freedom and the absolute authority of public law. Kant writes: “A *state (civitas)* is a union of a multitude of human beings under laws of right.”⁴⁰⁴ The citizens’ unanimous consent is the ground for public law. As explained in Chapter 3, since citizens are the constitutors of public law, they have to be subjected to it as well.⁴⁰⁵ This is the political commitment that Rousseau distinguished from the civil commitment.⁴⁰⁶ If public law (the social contract) is not based on the general will, it will revert to a law of informal prerogatives. The inherent democratic grounding of the social contract is the major difference with feudal law, in which popular freedom is only conditional—subject to the clash of private wills that can, for instance, be exchanged, sold, loaned, or traded—and in which process the state is a private stakeholder as well.⁴⁰⁷ Rousseau compares the old idea of freedom with the state of nature in which everyone has different ideas and interests. The old social contract, Rousseau says, is a fraudulent agreement, in reality unilaterally imposed by the powerful.⁴⁰⁸ Civil society, on the other hand, is constituted by the public will of the people, which is the only possible means of bringing together liberty and authority. To Rousseau and Kant, unlike Hobbes and Locke, civil subjection to the constitution is right only if it originates from the public will.⁴⁰⁹ The citizens’ will has final authority, not the government’s for that would amount to despotism.⁴¹⁰ Civil society is democratically framed if the public is constitutor of its own laws.

7.3 The existential public/private distinction: Man and the world

The second modern distinction between the public and the private is the “existential” one. It refers to the relation between the individual and the world. This relation shapes the way the person copes with existential publicness, how he develops his

own ethos towards life.⁴¹¹ “Public,” in this respect, concerns the world outside of him, his *existence* in the world, while “private” concerns his personal realm, his inner essence. The personal realm is the interior space of the individual where his experiences and sentiments are accessible exclusively to him and not directly knowable by the public at large. It is the space of sensational, non-linguistic knowledge (zero-order constructions).

The growing importance of the personal realm has telling religious roots.⁴¹² The existential public/private distinction received a special meaning during the Reformation. The idea of what can be called, after Rousseau, “existential sentimentality” was born, which stressed a principled division between man and the world.⁴¹³ The beginning stages of the Reformation undoubtedly gave a transcendental shock to the believer. As Weber vividly notes:

In its extreme inhumanity this doctrine must above all have had the consequence for the life of a generation which surrendered to its magnificent consistency. That was a feeling of unprecedented loneliness of the single individual. In what was for the man of the age of the Reformation the most important thing in life, his eternal salvation, he was forced to follow his path alone to meet a destiny which had been decreed for him for eternity.⁴¹⁴

Weber’s insight is substantiated by Luther’s remark concerning the purity of the personal in worshipping God: “It is evident that no external thing has any influence in producing Christian righteousness or servitude.”⁴¹⁵ The asymmetrical moral epistemology of Protestantism—characterized on the one hand by unconditional love for God, while on the other proclaiming the fundamental limits of human knowledge concerning His Will—triggered a focus on worldly existence and good action: “The valuation of the fulfillment of duty in worldly affairs was the highest form which the moral activity of the individual could assume,” Weber writes.⁴¹⁶ The answer to this fundamental religious uncertainty was to perceive the world as much as possible in a rational way. While God’s grace was in His hands, the world was in the hands of man, God’s child.

In the writings of Rousseau, the latent anxiety between human action and salvation reaches the very surface of critical reflection. Rousseau explicitly relates it to man’s place in civil society. The prominence in Luther’s thesis of the exclusive personal relationship with God makes way for Rousseau’s thesis concerning the solitary experience in nature: *le sentiment de l’existence*.⁴¹⁷ By stressing this religious sentiment but combining it with modern vigor, Rousseau emphasizes a deep conflict between the subject and civil society. It leads the subject to be in a partial, yet constant, state of what can be called “civil anxiety.” Rousseau’s idea of the subjective friction with the world is fundamentally influenced by the transcendence of the divine. In Protestantism, individual grace is exclusively

based on pure privateness, understood as the spiritual contact with the Divine. In Rousseau's philosophy, the reformist spiritual anxiety turns into a preromantic civil anxiety. Rousseau rejects the naturalism of people like Locke and Pufendorf and stresses the fundamental difference between the reality of the world and that of man himself.⁴¹⁸ God's creations are unfathomable and immaculate,⁴¹⁹ man's actions conventional and flawed. True justice is divine and beyond man's reason to grasp; it cannot—and therefore shouldn't—be derived from human nature: "What is good and in conformity with order is such by the very nature of things and independently of human agreement. All justice comes from God, who alone is its source; and if only we knew how to receive it from that exalted fountain, we should need neither governments nor laws."⁴²⁰

With Rousseau, religious sentimentality becomes human sentimentality; although deeply embedded in God's natural order, man is destined to step out and face the confrontation with the discordant civil order. To think himself confined to nature is a human illusion.⁴²¹ Rousseau imports the Protestant feeling of existential loneliness in his social theory. He is skeptical of human morality in general and distrustful of the Enlightenment's project of reason in particular—to the dissatisfaction of many.⁴²² It makes him a romanticist *avant la lettre*, a radical individualist.⁴²³ The ideal of cosmopolitanism is a farce to him. In reality, private people entering public spheres turn into actors and look for an audience that will acknowledge their reputation and nourish their self-esteem⁴²⁴: "The savage lives within himself; the sociable man, always outside of himself, knows how to live only in the opinion of others, and it is so to speak from their judgment alone that he draws the sentiment of his own existence."⁴²⁵

Rousseau's reservations were not without reason; during the later Enlightenment existential sentimentality became increasingly interpreted as "civil." The *moral* public/private distinction started to dominate the existential public/private distinction, and it socialized the inner conflict into a conflict between the private and public interests of the subject.

7.4 The moral public/private distinction: Man and society

The third modern public/private distinction is called a "moral" one because it describes civil processes of will formation, in which private preferences are publicly discussed and criticized with a view to human morality. The moral public/private distinction runs through the civil realm, which is the "private" aspect of the political public/private distinction. Habermas thus calls the developing modern public sphere a forum of *private* people, not because its historical citizens were selfish beings, but because their status was apolitical, not officially linked to state authority.⁴²⁶ They were members of civil society discussing a wide variety of topics independently of the execution of political power.

Democratic discourse radically changed the function of the public sphere:

what had been an automatic legitimation vehicle of public authority in which power was represented became instead an articulation channel of civil interests. The public sphere emerged in the wake of an emancipating civil society, and was separated from traditional authority. Habermas: “The decisive element was not so much the political equality of the members but their exclusiveness in relation to the political realm of absolutism as such: social equality was possible at first only as an equality outside the state.”⁴²⁷ The public sphere in the civil realm was perhaps especially a philosophical idea, based on the ambition to scrutinize authority in general by means of reason.

The emancipatory implications of the public sphere can hardly be overstated. Its emergence must have had a theatrical impact on people. As a place *and* as an idea it attracted gatherings of people—in a way strangers to each other—who needed to invent themselves, since hereditary status was out of fashion and no longer enough for civil praise.⁴²⁸ People engaged themselves in private practices (bookshop, hospital, church) and discussed their experiences and interests in front of the public. They were endowed with particular talents that were trademarks in the market place. Although many of these talents were economical, public spheres appeared in cultural realms, as well.⁴²⁹ The *bourgeois* was supposed to become a man—or woman⁴³⁰—of artistic taste, someone with the curiosity to train himself or herself to be a respectable participant in public discussions. Modern morality was based on a communicative subject.

“Public sphere” referred to what were in fact many public spheres in many different realms. What connected these realms was the idea of *human universality*, which gave people the motivation to reach an understanding about a certain topic, were it in manners, health, science or art. The public sphere was the arena of human reason, and it caused a dual psychological projection, the rationalization both of authority in general and of the competence of the public itself that claimed legitimacy. Intersubjectivity was the great promise of the public sphere. Habermas describes it again very well: “[Culture] was claimed as the ready topic of a discussion through which an audience-oriented (*publiksbezogen*) subjectivity communicated with itself.”⁴³¹ Modern subjectivity—in contrast to Reformist subjectivity—was based on a public process of self-understanding.

The philosophical idea behind the public sphere is “public reason,” which has been most prominently set out by Kant. Indeed, to Kant the public use of reason is a *forum activity*: “[B]y the public use of one’s own reason I mean that use which anyone may make of it *as a man of learning* addressing the entire *reading public*.”⁴³² The public use of reason is essentially communication between subjects using their reason, for which the condition of publicity is crucial: “The public use of one’s reason must always be free, and it alone can bring enlightenment among men. The private use of reason, on the other hand, may often be very narrowly restricted without particularly hindering the progress of enlightenment.”⁴³³ The very

freedom to be able to employ reason *commits* the subject to actually employ it, however. According to Kant, the virtue of toleration has not been invented for the mere protection of the right to express oneself, but to ensure that people really communicate.⁴³⁴ Toleration should serve those people who dare to step into publicity and want to lose the private immaturity (*Unmündigkeit*) that dominates their social roles, be it as patient, cleric, or state official. In the private sphere, people think for themselves, they seek to satisfy their interests and to follow tradition. Private communication is restricted; it always presupposes dependency on some external authority according to whose norms things ought to be done (be it religious belief or natural necessity). Public communication, however, runs on the internal authority of human reason itself. Theoretically, the public use of reason implies imagining the world as efficiently organized;⁴³⁵ practically, it leads to imagining oneself to be free agent.⁴³⁶ Both presumptions cannot be proven, however; they are based simply on a belief in reason.⁴³⁷

From all public vantage points, the public sphere in the political realm is seen as pivotal. Kant is its intellectual ghostwriter. His main objective is to base politics on public reason, which, Habermas writes, “allowed him to turn politics into a question of morality.”⁴³⁸ According to Kant, modern freedom can be understood only *in relation* to the membership of the political community (*civitas*). Man is inherently civil, and this condition should be understood in two ways, empirically (private) and morally (public). First, man is free to improve himself by creating and structuring his material surroundings. This private process of pursuing happiness has its limits, though, for it may “infringe upon the freedom of others to pursue a similar end,” and must therefore “be reconciled with the freedom of everyone else within a workable general law....”⁴³⁹ Hence, says Kant, the second aspect of civility lies in transcending the material world. In order to constitute a civil society that is marked by private wills that are directed to earthly matters (work, reproduction, health, etc.) a public will must evolve as well. The public will should be both formalized and abstracted from the empirical world. Since no *civitas* will ever emerge from a mere collection of private wills, its constitution rests on the capacity of people to publicly use their faculties of reason. Public reason has a double effect, then: it defines both the individual and society. Kant defines the connecting principle as follows: “All actions affecting the rights of other human beings are wrong if their maxim is not compatible with their being made public. This principle should be regarded not only as *ethical* (i.e., pertaining to the theory of virtue) but also as *juridical* (i.e. affecting the rights of man).”⁴⁴⁰ The public use of reason is directly related to the person’s ethos, which Kant defines as “the moral strength of a human being’s will in fulfilling his duty.”⁴⁴¹ Virtue is the moral source of public right: it generates the will to follow maxims that can be made public, thereby providing the moral foundations of the political community.

We can say, recapitulating, that with his rationalist injunction “dare to know”

(*sapere aude*) Kant challenged not only Luther's inner dictum "by faith alone" (*sola fide*) but also Rousseau's interpretation of existential sentimentality. With Kant, the modern experience of subjectivity creates a duty to use reason, which compensates for the difficult Protestant paradox of the privatization of conscience and the predestination of fate. The modern individual is endowed with a potential public identity prior to all his private roles: he or she is member of the human society. All subjects are equal by merit of their membership of the association of humankind. The prominence of this humanism⁴⁴²—which, ironically, resides in subjectivity—illustrates the process of religious secularization: the existential sphere loses its independent function as a spiritual shelter, a place of sentimental solitude, and turns into a breeding ground for human rationality. This secularization process is embodied by deliberation and will formation with the object of attaining civil harmony. The stage where this takes place is the public sphere.⁴⁴³

7.5 Rousseau and Kant: Two different approaches to modern politics

In this section I analyze the relations between, on the one hand, the existential and the moral public/private distinction and, on the other, the moral and the political public/private distinction. I will do so by comparing the positions of Rousseau and Kant.

7.5.1 *The relation between the existential and the moral public/private distinction*

I have explained Rousseau's analysis of modernity as a conflict between nature and reason, between irrationality and rationality. Rousseau believes man is right in the middle of it: in awe of God's perplexing world, yet uncomfortable in civil society as well. An inherent conflict exists between the profoundness of existential sentimentality and the edgy eagerness of reason. This conflict, according to Rousseau, may be emotionally appeased but cannot be rationally reconciled.

Kant thinks otherwise, believing that reasonability may be—or should be—expected from the subject, who sublimates his inner conflict by transforming his natural sentiments into a sentiment of reason.⁴⁴⁴ Modernity offers but one option, to step into publicity and communicate with fellow human beings about what it means to be born with reason. The public use of reason follows from the idea of treating humanity as an end in itself, respecting the other as a reasonable person, and thus seeing one's own will in correspondence with that of the public. As Habermas describes it aptly: "Subjectivity, as the innermost core of the private, was always oriented to an audience (*Publikum*)."⁴⁴⁵ The moral mirror image of the subject, in other words, is human society. Kant's metaphorical description of the ideal typical use of public reason—by a scholar before a reading public—is anticipatory, epitomizing the hope of emancipation, which is that the subject as a scholar, gifted with reason and capable of giving and receiving criticism, will educate himself

and become truly autonomous. This struggle between selfish and social reasons is a universal struggle that takes place in civil society, the moral playground of the political community.⁴⁴⁶ By introducing the concept of the public use of reason, Kant puts *moral publicness* in the forefront. And, importantly, in respect to the other two notions of publicness, it has a double function: the confrontation of one's private preferences in the public sphere *rationalizes* existential sentimentality, while it also provides for the *constitution* of public law. Existential sentimentality is pulled towards the dialectic tension between the private and public use of reason, while political will formation finds itself on the ideal of moral publicness.

Rousseau, meanwhile, is keen to retain the idea of existential sentimentality as it originated in the Reformation, although he gives it a civil twist. Existential publicness, the subjective relation to the world, inevitably brings a confrontation with civility.⁴⁴⁷ For this reason, Rousseau stresses the invaluable relationship between the subject and the transcendental natural order—the subject's connection with existence and subjective freedom. The sensation of being in contact with the world's splendor and greatness brings a certain life energy that invigorates the subject. Rousseau is eager to protect this personal realm, since it tends to be somewhat alienated by its confrontation with the society of man.

Kant opposes Rousseau's skeptical account of civility, for he believes in the growth of human morality. Kant understands civil anxiety from the start as a very different struggle, not between nature and reason but as a tension between two types of reason: self-directed and other-directed. He civilizes Rousseau's radical individualism by turning the notion of existential sentimentality into a rational desire. Kant wants to harmonize it with the public use of reason. It is hard to see what role the existential public/private distinction plays in Kant's political philosophy, since his definition of "private" is merely contrasted to the use of public reason and not translated as a state of existential sentimentality in relation to the outer world. The sentimentality that the Kantian subject experiences is a rational sentiment. Where the Rousseauvian subject's step into civility is dominated by an innate ambiguity and doubt about the relation between feelings and reason, the Kantian subject's step is rationally motivated and inherently public. It involves an inner battle between *Verstand und Vernunft*. As Onora O'Neill puts it: "Intellectual freedom is from the start not merely freedom to engage in inward or solitary reflection. Kant's conception of the private never becomes truly subjective that is, it never is a conception of the merely individual or personal."⁴⁴⁸ Kant's subject is always dealing with his practical conscience, leaving no room for inner naiveté, immaturity or unease with civil society.⁴⁴⁹ Kant is unaware of civil anxiety, seeing only the subject's moral challenge to think ahead.⁴⁵⁰ As God is creator of the universe, man in Kant's conception is creator of the world; he should be proud of his existence and take initiative.⁴⁵¹ Existential sentimentality, to Kant, consists both in gratitude for one's existence and in the transformation of that appreciation into responsibility

by contributing to civility and culture. In contrast, Rousseau rejects the integrative meaning of reason. Mindful of the semantic shortcomings of reason,⁴⁵² he makes a sharp distinction between private and public morality, in which the former, because of its deep link with existential sentimentality, will always be partly inexplicable.

7.5.2 *The relation between the moral and the political public/private distinction*

The difference between Rousseau's and Kant's approaches to the relation between the existential and the moral public/private distinctions emerges out of their different approaches to the moral and the political distinctions. Rousseau is skeptical not only about the possibility of civil harmony but also about the sufficiency of the moral dialectic to constitute the political constitution.⁴⁵³ This skepticism leads him to radically distinguish between the general will and civil will formation, between the civil (or moral) and the political commitment. Just as the shift from the personal to the civil is artificial, so is the shift from the civil to the political. Rousseau is keen to stress that although the *public as a sovereign* is always right, the *public as a people* is not. The chances that political society can be managed on the basis of civil will formation are slim.⁴⁵⁴ Due to the great instability of a civil morality (*volonté de tous*), the idea of a general will is vital to uphold the idea of the political body.⁴⁵⁵ The belief in the political body must hold citizens together in the face of the "universal desire for reputation, honours and promotion which devours us all."⁴⁵⁶ Rousseau's disbelief in the possibility of reconciling the subject with civil morality or of the attainment of civil harmony is the reason for his radical formulation of a concept of the general will.

The political commitment of the subject has therefore a *symbolic* rather than a *rational* quality.⁴⁵⁷ It is the metaphysical counterpart of the civil commitment. The general will is the epitome of politics because it signifies the idea of popular sovereignty, yet, as a practical device, it is not particularly helpful and needs to be supplemented. Of the political consequences—the actions of public authority—it says only that public authority will need to preserve the spirit of the general will. The human combination of sovereignty and moral deficiency leaves an important role to be filled by public authority, especially governmental, judiciary, and legislative assemblies. What are the responsibilities of these public authorities and how do they relate? Who is going to make sure that the laws given do in fact correspond to the general will?⁴⁵⁸ As said,⁴⁵⁹ Rousseau explicitly distinguishes the question of the social contract (or general will) from the question about its practical representation. Despite the sovereignty of the public, civil peace in the spirit of the social contract depends on institutions established by executive and legislative bodies.⁴⁶⁰

Rousseau emphasizes the Aristotelean (and also early-modern) question of political jurisdiction.⁴⁶¹ To govern is difficult and influenced by many circumstances that need to be taken care of as not to become potential hazards for civil peace.⁴⁶² Not

without reason, Rousseau spends a great deal of *The Social Contract* on explaining what political virtues are necessary in order to practically represent the general will. Rousseau argues that civil practices of will formation are the central source of political wisdom and the very focus of ruling, but that they do not have a moral equivalence with the social contract. Citizens in public spheres should not be seen as legislators; this is not their proper task. Maurice Cranston writes: “And just as the Tutor is the dominant figure of *Émile* so does the Lawgiver become the dominant figure of the *Social Contract*. Indeed, the Lawgiver repeats in the state the role that the Tutor performs for the individual.”⁴⁶³ Democracy cannot survive without a notion of authority independent of civil freedom. Respecting popular sovereignty can sometimes lead to strong administrative interventions.

Kant takes up where Rousseau leaves off. He connects the civil with the political commitment. Kant borrows from Rousseau the idea of the general will as the logical consequence of the idea of popular sovereignty, but he moralizes it by tying the political commitment to the public use of reason. The public process of will formation is, for Kant, the moral fundament of the political constitution. Still, although Kant is convinced that a connection must be made between the general will and the public use of reason, the connection cannot be grounded in a teleological understanding of the natural order. Kant takes seriously Rousseau’s lesson about the danger of making reason instrumental to the natural wishes of man, for that would only bring disruption of the civil order.⁴⁶⁴ Looking for a political order *within* reason itself, Kant comes up with the concept of the subject as a self-legislating (autonomous) being. The dissatisfaction inherent in the private use of reason becomes the motivation for reason’s public use. This motivation is essentially political, due to its universal working: it constitutes the *civitas*.⁴⁶⁵ The way the subject evaluates a maxim in relation to his will is the archetype of how political principles are to be constructed. Kant states that a maxim which “I cannot *publicly acknowledge* without thereby inevitably arousing the resistance of every one to my plans, can only stirred up this necessary and general (hence *a priori* foreseeable) opposition against me because it is itself unjust and thus constitutes a threat to everyone.”⁴⁶⁶ The public use of reason is the moral source of public law: “*Whatever a people cannot impose upon itself cannot be imposed upon it by the legislator.*”⁴⁶⁷ The transcendental formula of public right is the guiding principle in the public sphere. To Kant, as Habermas puts it, “civil law as a whole was public.”⁴⁶⁸

Habermas deems Kant the real democrat, seeing his political philosophy as the logical—and necessary—step in the development of the moral priority of public deliberation.⁴⁶⁹ Habermas’s verdict on Rousseau, on the other hand, is harsh: by refusing to truthfully develop the democratic logic of the social contract and indulging his suspicion about people’s political capacity, Habermas writes, Rousseau eliminates *de facto* the public sphere in the political realm,⁴⁷⁰ cutting

public will formation off from politics. I would suggest, however, that instead of an anti-democrat, Rousseau is a realist.⁴⁷¹ Rousseau retains aspects of the early-modern idea of public authority. In contrast to Kant, he preserves the strict distinction between public authority and sovereignty, arguing for the maintenance of public order by wise politicians who take notice of historically established civil practices and laws.⁴⁷² Although public authority is based on popular sovereignty, the practical formation of a political society cannot be based on a purely rational discussion. Such a process is multi-layered, and it occurs in civil practices that grow, evolve, and perish.⁴⁷³ Without a doubt, Rousseau is a democrat,⁴⁷⁴ but one who appreciates the practical importance of a legislation that is based on the habits, traditions, and mores of the people and which is taken care of by capable political representatives. Cranston writes: “The point Rousseau dwells on is that superiority in public office must correspond to superiority of capability and rectitude, or ‘virtue.’ Such a system he can call ‘aristocratic’ in the true classical sense of that word: government by the best.”⁴⁷⁵ Rousseau’s faith in the rational-critical capacity of the people is too slim to fully allow public deliberation to provide for the democratic legitimation of public authority. Just as important is the connection between political rule and social conventions and practices.

7.6 Conclusion

The differences between Kant and Rousseau seem at first surprising, since Kant was a great admirer of Rousseau and took Rousseau’s concept of the general will as the basis of his moral and political philosophy. Yet this is already where the differences begin. Kant has taken an important aspect of Rousseau’s *political* philosophy for a central element of his *moral* philosophy. Kant makes the political commitment voluntarist through the categorical imperative. The political commitment ultimately rests in a belief in the reasonable subject. Rousseau, however, stresses that the use of reason is artificial; it only starts to make sense if related to real things.⁴⁷⁶

Rousseau’s political philosophy has three important consequences for the general thesis of this book. First, moral knowledge is particular and concrete.⁴⁷⁷ Rousseau is a Deist and believes—like Aristotle—that goodness is achieved within the context of individual action itself. The individual should not lose contact with nature, the divine origin of goodness. The individual is best prepared to do well for self and others through a relation with the natural context. Rousseau’s conception of the existential public/private distinction is reminiscent of the epistemic problem: reality has a separate existence in relation to the human mind and cannot be directly communicated. And although moral knowledge is influenced by existential sentimentality, the two cannot be integrated. Put differently, because political theory is a third-order construction, it therefore ought to encompass the different orders of constructions, including the zero-order realm. Political theory needs to take into account the subject’s relation with the world.

Rousseau's second contribution to this book's thesis is his call for a critical stand against civil morality, since the socialization and codification of the good is unavoidably an inferior reproduction of the original.⁴⁷⁸ More particularly for our purposes, Rousseau offers skepticism towards rationalist conceptions of morality, suggesting that no natural harmony exists between personal and civil interests. Rousseau fears that by giving the moral dynamics of reason too great prominence, the subject will lose touch with existence and thus with a sense of freedom independent of convention and civility. Civil justice is a poor facsimile of justice; it should not be confused with the existential relationship between the world and the individual. Its codification, accordingly, will need to be sensitive to human individuality.⁴⁷⁹

Thirdly, following from both Rousseau's account of existential sentimentality and his distrust in civil morality, the public use of reason is not strong enough to bind a political community. The state of civil anxiety must lead to a strict distinction between the subject's civil and political commitments. The domination of the moral dynamics of reason will undermine the political commitment by making the legitimacy of public authority dependent on will formation. In this respect, the concept of the general will follows from the modern idea of subjectivity and gives a strong symbolic quality to the political commitment, which can be seen as the mirror image of existential sentimentality; the very freedom of the subject results in an understanding of the absoluteness of the social pact. Indeed, it is a kind of religion: "There is thus a profession of faith which is purely civil and of which it is the sovereign's function to determine the articles, not strictly as religious dogmas, but as expressions of social conscience, without which it is impossible to be either a good citizen or a loyal subject."⁴⁸⁰ Rousseau, all in all, is concerned with safeguarding the subject's existential sentimentality within an emerging civil society that was vibrant and wary of bourgeois explorations and expectations. Thus he advocates the need to develop a strong political society. The task of modern existence is to cope with civil anxiety, while believing still in the democratic supremacy of the polity.

In Chapter 1, I explained the dominant and questionable workings of the publicity imperative. According to many scholars, the moral underpinning of politics is the public deliberation of private preferences with the intention of transforming them. The publicity imperative is the civil tit-for-tat of the concept of popular sovereignty: to be a citizen entails a duty to think and deliberate about the general good for society. That is the burden of modern freedom, it is widely held. With his concept of the public use of reason, Kant has given the classic defense of the publicity imperative. The moral public/private distinction dominates his political philosophy. On the one hand, the moral subject is a political subject; his public use of reason establishes the social contract. On the other hand, alongside transforming private into public interests, the public use of reason implies also a motivation on the part of the subject to disengage from existential sentimentality. The public use of reason, in other words, cuts both ways: it both rationalizes the subject (away

from the personal) and politicizes the subject (towards the political). It tells the subject not just to speak up, but to do so in a critical fashion, as a scholar for a reading public. Precisely this simple yet utterly ambitious idea has led to a great emphasis on political will formation as the medicine for a decent society.

(Notes)

³⁸² See also section 1.2.

³⁸³ See also section 3.6 for a critique on Habermas.

³⁸⁴ For an interesting analysis on conceptions of public and private, see Benn and Gaus, "Public and Private." It is for future study to integrate their findings with the three modern conceptions of publicness, analyzed below.

³⁸⁵ Section 3.4.

³⁸⁶ As Luther put it: "If [temporal government] did not exist, no man could survive because of the rest: they would devour one another as the senseless beasts do among themselves." Cited in: W.D.J. Cargill Thompson ([1966], 1990) "Martin Luther and the 'Two Kingdoms,'" p. 43.

³⁸⁷ The process of state growth was accelerated by mercantilism and facilitated by the emerging empirical sciences, with Francis Bacon as an important frontrunner. See Blackburn, *Dictionary of Philosophy*, pp. 34-35.

³⁸⁸ M. Foucault (1991) "Governmentality."

³⁸⁹ Foucault refers to the Italian jurists G. Botero and G.A. Palazzo. The latter argued that "state rationality is a method that provides us with understanding how to create peace and order in the republic." *Ibidem*, pp. 71-72. My translation. Cf. E. Cassirer ([1946], 1974) *The Myth of the State*, p. 153: "*The Prince* is neither a moral nor an immoral book: it is simply a technical book. In a technical book we do not seek for rules of ethical conduct, of good and evil. It is enough if we are told what is useful or useless."

³⁹⁰ Habermas, *Structural Transformation*, p. 9.

³⁹¹ Q. Skinner ([1978], 2000) *The Foundations of Modern Political Thought: The Age of Reformation*, p. 257. (Henceforth: *Age of Reformation*). Versailles is the pivotal example of absolutism, a combination of royal glorification of power with an extensive administrative body (the city of Versailles was a city mostly of governmental buildings).

³⁹² Habermas, *Structural Transformation*, p. 12. To be sure, Habermas does not call it "administrative publicness," only stresses the growing importance of the administrative state.

³⁹³ *Ibid.*, p. 7. Cf. Sabine, *History of Political Theory*, p. 650.

³⁹⁴ Habermas, *Structural Transformation*, p. 18. The depersonalization and rationalization of state authority, as Weber put it (([1921], 1978) *Economy and Society: An Outline of Interpretative Sociology*, p. 959), can also be explained economically, since mercantilist logic demanded strict administrative and military measures for the opening and expanding of foreign markets. Moreover, as the court was losing its natural allies

(especially church and nobility) it needed the loyalty of the carriers of early capitalism to retain power.

³⁹⁵ Habermas, *Structural Transformation*, p. 11. Cf. *ibid.*, p. 19: “Civil society came into existence as the corollary of a depersonalized state authority.” *Ibid.* Habermas rightly refers to Arendt, who defines society as “the form in which the fact of mutual dependence for the sake of life and nothing else assumes public significance, and where the activities connected with sheer survival are permitted to appear in public.” Arendt, *Human Condition*, p. 46. See also: M. Foucault (1992) *De wil tot weten. De geschiedenis van de seksualiteit*, p. 29.

³⁹⁶ See E.H. Kossmann (1958) “Bodin, Althusius en Parker, of: over de moderniteit van de Nederlandse opstand” and E.H. Kossmann (1980) “Volksoevereiniteit aan het begin van het Nederlandse Ancien Régime.” Henceforth: “Volksoevereiniteit.” Cf. Sabine, *History of Political Theory*, p. 418.

³⁹⁷ Skinner, *Age of Reformation*, p. 338.

³⁹⁸ During the Enlightenment the organization of society was often seen according to the model of a *societas*, being the basis of political democracy. See e.g. E.H. Kossmann (1981) “Aan het volk van Nederland,” pp. 250-251.

³⁹⁹ J. Locke ([1690], 2002) “Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government,” Chapter 2, italics JL. For a thoughtful commentary: G.A. den Hartogh ([1988], 1994) “Inleiding.”

⁴⁰⁰ R. Kubben (2005) *Eenheid in drievoud: Een vertoog over macht, scheiding en fragmentatie in het openbaar bestuur*, p. 19.

⁴⁰¹ Sabine, *History of Political Theory*, p. 529, italics GD.

⁴⁰² Habermas, in this respect, shows how Locke did not see opinion as being suitable for legislation. “Law of opinion was by no means meant as law of public opinion; for ‘opinion’ neither arose in public discussion—it became binding instead ‘by a secret and tacit consent’—nor was it applied in some way to the laws of the state, because it was actually grounded in the ‘consent of private men who have not authority enough to make law.’” Habermas, *Structural Transformation*, p. 91. Cf. Sabine, *History of Political Theory*, pp. 534-535.

⁴⁰³ Den Hartogh, “Inleiding,” pp. 49-50. See also Sabine, *History of Political Theory*, p. 534: “The power of the people over government, however, is still not quite as complete in Locke as it came to be in later and more democratic theories. Though he called the power of the legislature fiduciary and a delegation from majority that acts for the community, he retained the older view that the grant of the community divests the people the power so long as the government is faithful to its duties.” It can be argued then that Skinner erroneously calls Locke the first author who developed a truly democratic legitimation of state authority. Skinner, *Age of Reformation*, p. 338. To be sure, even if Skinner was right, it should be stressed that Althusius’s more democratic political theory was earlier than Locke’s. See for a convincing defense of Althusius as the Locke *avant la lettre*: Kossmann, “Volksoevereiniteit.”

⁴⁰⁴ Kant, *Metaphysics of Morals*, §45, p. 90, italics IK.

⁴⁰⁵ Section 3.4.

⁴⁰⁶ “There is only one law which by its nature requires unanimous assent. This is the social pact: for the civil association is the most voluntary act in the world; every man having been born free and master of himself, no one else may under any pretext whatever subject him without his consent.” Rousseau, *Social Contract*, p. 152. See also: Rousseau, *Social Contract*, Bk. II, Ch. 4, p. 75: “[T]he equality of rights and the notion of justice which [the general will] produces derive from the predilection which each man has for himself and hence from human nature as such.” See also Kant, *Metaphysics of Morals*, §46, p. 91.

⁴⁰⁷ Apeldoorn, *Inleiding*, p. 89

⁴⁰⁸ M. Cranston (1991) *The Noble Savage: Jean-Jacques Rousseau 1754-1762*, p. 303.

⁴⁰⁹ Rousseau, *Social Contract*, p. 55. Cf. Kant, *Metaphysics of Morals*, §46, p. 91.

⁴¹⁰ Kant, *Metaphysics of Morals*, §46, p. 92.

⁴¹¹ Cf. Foucault’s four different dimensions of the subject (or self) concerning what he calls the “techniques of the self.” The first dimension is that of the “ethical subject,” which is quite comparable to the ethical public/private distinction. See Foucault, “Genealogy of Ethics.”

⁴¹² See also section 1.2.

⁴¹³ Cf. Geuss, *Public Goods, Private Goods*, p. 112.

⁴¹⁴ Weber, *Protestant Ethic*, p. 104.

⁴¹⁵ Luther, “Freedom of a Christian Man,” p. 5.

⁴¹⁶ Weber, *Protestant Ethic*, p. 80. Cf. Taylor, *Sources*, pp. 215-216, 228.

⁴¹⁷ “The source of unity and wholeness which Augustine found only in God is now to be discovered within the self.” Taylor, *Sources*, p. 362. Cf. I. Kant ([1785], 1956) *Groundwork of the Metaphysic of Morals*, pp. 98. Henceforth: *Groundwork*.

⁴¹⁸ Taylor, *Sources*, p. 358; see also Hupperts-Cluysenaer, *Wetenschapsleer voor juristen*, p. 222. Certainly, Kant’s key distinction between nature (object of physics) and freedom (object of ethics) is in line with Rousseau’s view. See Kant, *Groundwork*, pp. 67 ff.

⁴¹⁹ See the opening sentence of his *Émile*: “Everything is good as it leaves the hands of the author of things, everything degenerates in the hands of man.” J.-J. Rousseau ([1762], 1957) *Émile, or On Education*. Henceforth: *Émile*.

⁴²⁰ Rousseau, *Social Contract*, p. 80.

⁴²¹ As Rousseau portrays it: “But when, in my desire to discover my own place within my species, I consider its different ranks and the men who fill them, where am I now? What sight meets my eyes! Where is now the order I perceived? Nature showed me a scene of harmony and proportion; the human race shows me nothing but confusion and disorder. The elements agree together; men are in a state of chaos.” Rousseau, *Émile*, book IV. Cf. “Civil man, ... being always active, sweating and restless, torments himself endlessly in search of ever more laborious occupations; he works himself to death...” J.-J. Rousseau ([1755], 1987) *Discourse on the Origins and Foundations of Inequality Among Men*, p. 136. Henceforth: *Discourse on Inequality*.

⁴²² In a reaction to the *Discourse on Inequality* Voltaire wrote to him: “I have received, Monsieur, your new book against the human race, and I thank you.” See M. Cranston ([1984], 1987) “Introduction,” pp. 45 ff.

⁴²³ Cf. Cranston, *Noble Savage*, pp. 302 ff. As Arendt writes: “The rebellious reaction against society during which Rousseau and the Romanticists discovered intimacy was directed first of all against the levelling demands of the social, against what we would call today the conformism inherent in every society.” Arendt, *Human Condition*, p. 39. Rousseau’s struggle also reminds of Socrates’s dilemma: whether to give way to one’s conscience or to follow outside norms.

⁴²⁴ See R. Sennett ([1974], 1992) *The Fall of Public Man*, pp. 115-121.

⁴²⁵ Cited in: Van den Hoven, *Information Technology and Moral Philosophy*, p. 169.

⁴²⁶ Habermas, *Structural Transformation*, pp. 27 ff. See also: C. Taylor (1995) “Liberal Politics and the Public Sphere,” p. 266. To be sure, a reference to Habermas’s *Structural Transformation* in this article by Taylor would have been appropriate—to say the least.

⁴²⁷ Habermas, *Structural Transformation*, p. 35.

⁴²⁸ For an evocative description see Sennett, *Fall of Public Man*, Chapter 3. Habermas refers to Goethe who defined the essence of the aristocrat as “what he represented.” The *bourgeois*, however, could not rely on any representation beforehand: he was socially indefinite, and could only (to a certain extent, obviously) create himself. “Hence, Goethe advised not to ask [the *bourgeois*] ‘What art thou?’ but only: ‘What hast thou? What discernment, knowledge, talent, wealth?’ This is a statement which Nietzsche’s later aristocratic pretensions adopted: a man proved himself not by what he could do, but by who he was.” Habermas, *Structural Transformation*, p. 13. Cf. Walzer’s note: “And when every man and woman becomes, as it were, a smallholder in the sphere of birth and blood, an important victory is indeed won.” Walzer, *Spheres of Justice*, p. 16.

⁴²⁹ Or, as Habermas nicely calls them, public spheres in the world of letters Habermas, *Structural Transformation*, pp. 51-56.

⁴³⁰ Think of salons being led by women like Madame De Geoffrin, Madame d’Épinay and Madame Necker, not particularly *bourgeois*, yet spirited with enlightenment.

⁴³¹ Habermas, *Structural Transformation*, p. 29.

⁴³² Kant, “Enlightenment,” p. 55. italics IM.

⁴³³ Cited in: Habermas, *Structural Transformation*, p. 106.

⁴³⁴ Onora O’Neill remarks the illiberal tendency of this position: “[H]is principle appears to afford no protection for uses of reason which are not public, and these for many liberals are uses that particularly need protection.” O. O’Neill (1986) “The Public Use of Reason,” p. 526.

⁴³⁵ Kant, “Orientation in Thinking,” pp. 241-242.

⁴³⁶ “For in such a being we conceive a reason which is practical—that is, which exercises causality in regard to its objects. ... Reason must look upon itself as the author of its own principles independently of alien influences. Therefore as practical reason, or as the will of a rational being, it must be regarded as by itself as free.” Kant, *Groundwork*, p. 116.

⁴³⁷ Kant, "Orientation in Thinking," p. 245.

⁴³⁸ Habermas, *Structural Transformation*, p. 111. According to O'Neill for Kant "practical uses of reason are more fundamental than theoretical uses of reason." O'Neill, "The Public Use of Reason," p. 524.

⁴³⁹ I. Kant ([1792], 1970, 1999) "On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice,'" p. 74. Henceforth: Kant, "Theory and Practice," p. 74.

⁴⁴⁰ Kant, "Perpetual Peace," p. 126. See also Kant "Theory and Practice," p. 73.

⁴⁴¹ Kant, *Metaphysics of Morals*, § 6:405.

⁴⁴² Taylor calls it the feeling of "dignity." Taylor, "Politics of Recognition," p. 44. See for Kant's description of the feeling: *Groundwork*, p. 102.

⁴⁴³ Habermas, *Structural Transformation*, p. 55. Cf. Rawls: "A citizen engages in public reason, then, when he or she deliberates within a framework of what he or she sincerely regards as the most reasonable political conception of justice, a conception that expresses political values that others, as free and equal citizens might also reasonably be expected reasonably to endorse." Rawls, "Idea of Public Reason Revisited," p. 140.

⁴⁴⁴ Kant stresses that it is "a natural vocation of man to communicate with his fellows, especially in matters affecting mankind as a whole." Cited in: Habermas, *Structural Transformation*, p. 107.

⁴⁴⁵ Habermas, *Structural Transformation*, pp. 48-49. Cf. Taylor, *Sources*, p. 83.

⁴⁴⁶ Cf. Hegel, who was well aware of the vital importance of the proper organization of civil society in liberal democracies, which he understood as the functional organization of civil societies in spheres or units (*Kreise*).

⁴⁴⁷ As Charles Taylor puts it: "The original impulse of nature is right, but the effect of a depraved culture is that we lose contact with it." Taylor, *Sources*, p. 357. To be sure, it would be more apt to say that the impulse of nature is right, and the effect of culture *in general* is to lose contact with it. Taylor rightly perceives Rousseau's skepticism of human reason's moral breadth as a radicalization of the process of individualization. Rousseau elects subjectivity as the best road to goodness. "We might speak of an *individualized* identity, one that is particular to me, and that I discover in myself. This notion arises along with an ideal, that of being true to myself and my own particular way of being." Taylor, "Politics of Recognition," p. 28.

⁴⁴⁸ O'Neill, "The Public Use of Reason," pp. 529-530.

⁴⁴⁹ Cf. Taylor's consent with this statement: "The monological ideal ... forgets how our understanding of the good things in life can be transformed by our enjoying them in common with people we love; how some goods become accessible to us only through common enjoyment." Taylor, "Politics of Recognition," p. 33. Cf. O'Neill: "[Reason] is not [something] we can plan to leave; and were we to try to do so, we would be left in solitary and thoughtless silence." O'Neill, "The Public Use of Reason," p. 539. Taylor, "Politics of Recognition," p. 34.

⁴⁵⁰ An explanation, perhaps, of why in contemporary political philosophical Anglo-

Saxon literature Kant is much more often appreciated compared to Rousseau.

⁴⁵¹ “Give me matter,” Kant says, “and I will build a world from it, that is, give me matter and I will show you how a world developed from it.” Cited in: Arendt, *Human Condition*, pp. 295-296. Arendt calls this the depiction of the *homo faber*.

⁴⁵² “If children understood reason they would not need education, but by talking to them from their earliest age in a language they do not understand you accustom them to be satisfied with words, to question all that is said to them, to think themselves as wise as their teachers; you train them to be argumentative and rebellious; and whatever you think you gain from motives of reason, you really gain from greediness, fear, or vanity with which you are obliged to reinforce your reasoning.” Rousseau, *Émile*, Book II.

⁴⁵³ See for an opposite view: P. Riley (2001) “Rousseau’s General Will.”

⁴⁵⁴ “Individuals see the good and reject it; the public desires the good but does not see it.” Rousseau, *Social Contract*, Bk. II, Ch. 6, p. 83. In this regard, Rousseau’s plea for a civil religion might be understood.

⁴⁵⁵ Cf. Cranston, *Noble Savage*, p. 310: “For Rousseau there is a radical dichotomy between true law and actual law.” As will become clear later in the Chapter, next to the idea of the general will, Rousseau deemed it important to compensate the danger of private interests in politics by arguing for a group of wise politicians.

⁴⁵⁶ Cited in: Cranston, “Introduction [to the *Social Contract*],” p. 44.

⁴⁵⁷ Cf. section 4.4.3.

⁴⁵⁸ Legislative issues must be taken care of by an extraordinary agent, says Rousseau, “not only because of his genius, but equally because of his office, which is neither that of the government nor that of the sovereign.” Rousseau, *Social Contract*, Bk. II, Ch. 7, p. 85.

⁴⁵⁹ Section 3.4.

⁴⁶⁰ “What, then, is the government? An intermediary body established between subjects and the sovereign for their mutual communication, a body charged with the execution of the laws and the maintenance of freedom, both civil and political.” *Ibid.*, p. 102.

⁴⁶¹ Section 6.4.4.

⁴⁶² Rousseau, *Social Contract*, Bk. II, Ch. 6, p. 80.

⁴⁶³ Cranston, “Introduction [to the *Social Contract*],” p. 43.

⁴⁶⁴ Cf. R.L. Velkley (1993) “The Crisis of the End of Reason in Kant’s Philosophy and the *Remarks* of 1764-1765,” p. 85.

⁴⁶⁵ “[T]he dialectic that lies concealed within [the subject’s] own breast no less than in that of his antagonist.” Kant cited in: O’Neill, “The Public Use of Reason,” p. 538. See also Kant, *Groundwork*, p. 129.

⁴⁶⁶ Kant, “Perpetual Peace,” p. 126, italics IK.

⁴⁶⁷ Kant, “Theory and Practice,” p. 85, italics IK.

⁴⁶⁸ Habermas, *Structural Transformation*, pp. 271-272, nt. 71; see also *ibid.*, p. 108.

⁴⁶⁹ Cf. Cranston, *Noble Savage*, p. 308.

⁴⁷⁰ Habermas, *Structural Transformation*, pp. 97-98.

⁴⁷¹ Maurice Cranston calls Rousseau a “republican” rather than a “democrat.”

⁴⁷² Cf. for a similar argument: Honig, “Between Decision and Deliberation.”

⁴⁷³ See Cranston (1968) “Introduction [to Rousseau’s *Social Contract*],” p. 38.

⁴⁷⁴ “Thus, although the government may regulate its interior discipline as it pleases, it can never speak to the people except in the name of the sovereign, that is, in the name of the people itself – something that must never be forgotten.” Rousseau, *Social Contract*, p. 114

⁴⁷⁵ Cranston, *Noble Savage*, p. 309.

⁴⁷⁶ “If children understood reason they would not need education, but by talking to them from their earliest age in a language they do not understand you accustom them to be satisfied with words, to question all that is said to them, to think themselves as wise as their teachers; you train them to be argumentative and rebellious; and whatever you think you gain from motives of reason, you really gain from greediness, fear, or vanity with which you are obliged to reinforce your reasoning.” Rousseau, *Émile*, Book II.

⁴⁷⁷ “Moral dimensions have no precise standard of measurement; even if we could agree about signs, how should we agree on their value?” Rousseau, *Social Contract*, p. 130.

⁴⁷⁸ Rousseau’s approach in this respect has indeed similarities with Aristotle’s.

⁴⁷⁹ Rousseau’s adage is: “Live your own life and you will be no longer wretched. Keep to your appointed place in the order of nature and nothing can tear you from it.”

⁴⁸⁰ Rousseau, *Social Contract*, Book IV, Ch. 8, p. 186.

CHAPTER 8

The Rise of Politics as Will Formation: The Instrumentalization of Public Reason

8.1 Introduction

I have explained the rise of modern politics by focusing on a triple relation between the subject and what lies “outside:” the world (in an existential relation), authority (in a political relation), and finally, humankind (in a moral relation). I have argued that—through the work of Kant—the moral public/private distinction has come to overshadow the other two notions of publicness: the public use of reason has been depicted both as the ground of human existence and as the very source of legitimate public authority. In this final chapter, by introducing the political thoughts of Marx, Mill, and Dewey (sections 8.3-8.5), I explain how the domination of the moral public/private distinction has obscured both existential and political publicness. Put differently, the political subject is misleadingly characterized by his moral publicness: his ability to publicly transform his private inclinations becomes the source of state legitimacy. This has led to what I call the public sphere’s double bind: besides being a moral educator the public sphere is seen as the provider of political legitimacy.

8.2 Kant: The reconciliation of public reason

According to Kant, there is no difference in principle between morality and law. The way the subject evaluates a maxim is the archetype of how principles of public right are to be evaluated. Kant is a liberal individualist: he draws a straight line from the moral subject to the political domain. The realization of civil harmony lies in the capacity of the subject to look beyond his or her empirical wishes for private happiness, while following his belief in the reason of law. Still, despite Kant’s optimistic, historicist perspective, he is aware of the formidable gap that still exists between the civil and the political—but he refers the incongruence to the fallible subject, whose ambitions often overpower the love for reason.

Habermas takes up the Kantian gap between civil morality and public law. He points out that Kant’s conception of the public use of reason is formalist and empty and contends that it cannot really deal with the phenomena. A belief in the long-term effect of the public use of reason only makes sense, Habermas thinks, within a specific material context in which individuals can actually use their reason—a proper income, education, and health. The civil status of using reason thus needs to come under the scrutiny of public reasoning itself. Habermas:

[I]n so far as the natural basis of the juridical condition as such was

problematic, the establishment of such a condition—which to this point has been treated as a *precondition* for a moral politics—was itself to be made the content and task of politics. A new function would thereby also accrue to the public sphere which was to keep politics in harmony with the laws of morality—a function which it would ultimately be impossible to accommodate within the Kantian system.⁴⁸¹

Kant, however, vigorously opposes the materialization of reason on the grounds that it goes against the idea of reason itself. He argues that the sensation of freedom that accompanies the subject's self-image as a reasonable being ought to be sufficient in any circumstances. To reason empirically or technically, based on the vagaries of circumstance, cannot dictate morals; if it did, it would suggest that human freedom was conditional and based on private, contingent preferences.

Hence everything that is empirical is, as a contribution to the principle of morality, not only wholly unsuitable for the purpose, but is even highly injurious to the purity of morals; for in morals the proper worth of an absolutely good will, a worth elevated above all price, lies precisely in this—that the principle of action is free from all influence by contingent ground.⁴⁸²

Accordingly, the conflict between private and public reason itself should not be transposed to the political level and made an *object* of public law, lest it make law and morals merely instrumental to happiness. Although the civil conflict is the moral foundation of the social contract, public authority, as the representative of the general will, cannot intervene into this process. The moral conflict must remain civil; public right must remain formal. The intervention of public authority in civil welfare will lead not only to unwanted paternalism but to the materialization of public law. Kant wishes to exclude the dialectic between the good and the right from the political arena.⁴⁸³ Law cannot be misused for private goals, for otherwise the constitution “suspends the entire freedom of subjects, who thenceforth have no rights whatsoever.”⁴⁸⁴

According to Kant the social contract holds that within the political order, people will deal individually with the conflict between experience and reason while also accepting the rule of law for the sake of maintaining the political order. Kant believes that the subject will accept the gap between the righteous generality of public law and the difficult particularity of civil existence.⁴⁸⁵ Despite our everyday confrontation with the crude contingency of the natural world, God's gift of reason should put us in touch with a free world that the force of nature cannot take away. This belief, Kant predicts, will also be the motivation to further develop our skills. Despite the brutality of nature, we should thank God for the worldly challenge He

has given us.⁴⁸⁶ In the end, the reasonableness and truth of public law cannot be empirically forced nor collectively administrated—only subjectively revealed.⁴⁸⁷ Although based in reason, existential sentimentality still has a crucial task to fulfill in Kant's theory: to maintain the subjects' faith in public right.

8.3 Marx: The politicization of public reason

Karl Marx rejects Kant's conclusion. Although he upholds Kant's metaphysical distinction between natural necessity and rational freedom, progress for Marx means *overcoming* the distinction by converting reason into action.⁴⁸⁸ Marx's stress on realizing the promise of reason brings about two important changes in the modernist public/private distinctions: first, formal reason (*Vernunft*) should follow empirical reason (*Verstand*); second, public authority should intervene into the civil order to increase morality.

To Marx, the realization of man's status as a universal subject can begin only when he is in control of the natural order. His confrontation with his natural limitations should not become an excuse for moral subjectivity; quite the contrary, it should motivate him to take nature's challenge on and try to objectify and adapt the natural surrounding to his needs. Marx calls for technology to free man's natural dependence: the ideal of freedom will become reality only after the phenomena *themselves* have been dealt with by reason.⁴⁸⁹ "Freedom ... can only consist in the socialised man, the associated producers, rationally regulating their interchange with Nature, bringing it under common control, instead of being ruled by it as by the blind forces of Nature."⁴⁹⁰ Although Kant and Marx operate in the same ontological framework, desiring to overcome the antagonism between man and nature in the light of man's destiny as a "species-being," they have different ideas about realizing this goal.⁴⁹¹ Kant believes that ultimate well-being lies in both the *moral transformation* and the *political reconciliation* of the nature/reason antagonism, while Marx explores its *political transformation*.⁴⁹²

In contrast to Kant's belief in the harmonic qualities of public reason at a civil level, Marx sees public reason as an ideological construction of private interests, and he sees civil society as the institutionalized aggregation of these interests.⁴⁹³ The liberal relation between formal equality in the public sphere and actual freedom in the private sphere works only for the culturally well-educated commodity owner. In reality, the vast majority of people do not fit this socioeconomic category. Observing this great discrepancy between civil reality and public right, Marx concludes that, for the majority, the idea of subjective freedom defined by publicly using one's reason is mere ideology:

Far from the rights of man conceiving of man as a species-being, species-life itself, society appears as a framework exterior to individuals, a limitation of their original self-sufficiency. The only bond that holds them together is

natural necessity, need, and the private interest, the conservation of their property and egoistic person.⁴⁹⁴

In order to take seriously the Enlightenment ideal of moral self-realization, it would be necessary to deal with civil injustice itself.⁴⁹⁵

To be sure, Marx's response to Kant is in line with Kant's framework of politics as will formation—although Marx's is a radical interpretation. Marx materializes *and* politicizes the Kantian clash between self-interest and altruism. The moral distinction between the public and the private use of reason transforms into a political dialectic between private and public interests. Marx desires to politicize the civil order in order to technically control natural phenomena and realize the idea of public reason.⁴⁹⁶ Marx returns to the social contract and dismisses its formal, Kantian—or more general, liberal—interpretation, which, he says, has neutralized the distinction between society and state. By literally *abstracting* from all of civil society's material and cultural aspects, Kant has given civil society an *apolitical* status.⁴⁹⁷ The political public/private distinction provides for a general and formal system of justice, on the basis of an empty moral understanding of man, Marx argues. Kant has ideologically linked public law to the idea of the public sphere, which in turn he understands as “the community sphere, the *general* concern of the people, in principle independent from these particular elements of civil life.”⁴⁹⁸

Marx argues that the liberal formula that the justification of the social contract should be based on the use of public reason can only be proven by an empirical analysis of the civil community. Such an analysis would reveal both whose general concern is actually at stake and how this concern is represented by public authority. According to Marx, though, it is clear that both the public articulation of the general interest and its political representation are determined by group interest. Marx therefore seeks to close the gap in the political public/private distinction, which requires a politicization of moral action.⁴⁹⁹ The remodeling of the political community would be necessary in order to take seriously Kant's idea of the universal subject; such a revision would require the oppressed classes to seize political power.⁵⁰⁰ If the proletariat wins the “battle of democracy,” as Marx and Engels call it, class interest will cease to be the motor of political power, and politics will be neutralized *again*. In Marx's philosophy, “the state” is a temporary concept, and if its civil contradictions are eliminated through collective action, the logical result is its “withering away.” As Habermas writes, the communist integration of the civil and the political would shatter the unjust foundations of the state and bring to light a purely civil sphere: “In this sphere, the informal and personal interaction of human beings with one another would have been emancipated for the first time from the constraints of social labor (ever a ‘realm of necessity’) and become really ‘private.’”⁵⁰¹ Communism means true civil harmony, the ultimate realization of the Kantian subject through a political intervention.

Marx's critique of liberalism never resulted in the communist dream (not counting its many tyrannical twentieth-century bastards), but the main points of his theory came to play a crucial role in later political discussions. Although the political organization of civil society happened *within* the confines of the state—without destroying it after all⁵⁰²—Kant's and Rousseau's readings of the political public/private distinction did find themselves reinterpreted. The politicization of society that Marx argued for did become a reality, although in a different fashion.⁵⁰³ While it was assumed by liberalism that loyalty to the social contract would hold fast (facilitated by a system of social and political rights), the political *administration* of society and the moral *organization* of the polity became new priorities. Both processes became part of the social realization of the social contract—the upshot of the moral idea of mankind as a community. Both processes further intensified and instrumentalized the moral public/private distinction.

8.4 Mill: The civilization of public reason

Like Marx, John Stuart Mill understands the use of public reason empirically, but unlike Marx, he accepts the social contract. Mill entertains a moral instrumentalism that should civilize politics. He argues that Kant's transcendental conception of the categorical imperative is empty and has thus no practical use. The mere idea of the public use of reason cannot create a real balance between private and public preferences or interests, a problem Mill deems part and parcel of modern society. In the era of revolutions, Mill argues, the idea of public reason might have justified the moral foundations of the political community, but as a way to assess a bundle of private interests in the light of arriving at a public interest, it is useless. Hence, Mill writes, “[t]o give any meaning to Kant's principle, the sense put upon it must be, that we ought to shape our conduct by a rule which all rational beings might adopt *with the benefit to their collective interest*.”⁵⁰⁴ The only sensible interpretation of the general will would be that it is in the interest of each person to actually follow the rule because it will benefit him. Having merely a subjective belief in the rightness of a rule, maxim, or law is insufficient; its value needs to be determined by empirically testing its consequences.⁵⁰⁵

With Mill, the liberal idea of liberty *as we know it*, first appears: to be free to live life as one wishes *within* the civil order. Mill shares Benjamin Constant's enthusiasm for a modern liberty that emphasizes the individual, but Mill gives it a social character, insisting that we as subjects are free to pursuing our good and to deliberate and explain our concept of it—but only “[s]o long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.”⁵⁰⁶ To put it differently, Mill is the first to explicitly formulate the modern condition of pluralism—with a firm belief, to be sure, that people in the end *do* want to put their altruism first. The individual is free to seek happiness in his own way, yet he needs to understand that his actions will be judged according to their consequences. If the consequences are

harmful, then the state (representing the collective good) has a right to prevent the individual from further actions. This implies that the individual should be socially educated so that he will learn how to act responsibly by anticipating such public sanctions.⁵⁰⁷

Mill's concept of public reason foreshadows pragmatist politics and extends the Kantian primacy of the moral public/private distinction. It is an intensification of the idea of politics as will formation. Mill disregards the notions both of existential sentimentality and of the political commitment, by tying them to the moral discourse about balancing private and public preferences.

For Mill, metaphysics is over. In contrast to Kant and Marx, Mill rejects the dualism between reason and nature.⁵⁰⁸ Both Kant and Marx believed that a fulfillment of man's fate comes in the struggle between nature and reason, to Mill, however, the opposition between the "Liberty of the Will" and "Philosophical Necessity" is dead wrong: man's striving should be fully focused on controlling his resources (within a framework of right). Man's struggle is not about coping with the idea of freedom in the midst of the forces of nature, but using these forces in order to get the right results. Likewise, Mill is not interested in the philosophical ins and outs of constituting the political community. The political horizon has changed drastically with the advent of liberal democracies, so there is no need to worry about the metaphysical intricacies of establishing and preserving the body politic based on the principle of popular sovereignty.⁵⁰⁹ The principle of democratic sovereignty, firmly established and solidified with "the recognition of certain immunities" (rights) and "the establishment of constitutional checks," bounds the governing power.⁵¹⁰ Although Mill concurs with Marx that, in reality, the idea of the general will is merely the public articulation of private interests by fluctuating majorities, Mill believes the accomplishment of the collective good can be reached within the liberal political constitution.

We may recall that Rousseau related the importance of the political pact to the notion of existential sentimentality. It pointed to the inherent limit of human reason and thus to the moral success of the dynamics between private and public reason as well. Due to the impossibility of constituting the social contract through a process of moral will formation, the political pact was to rest on the assumption of its very inevitability, which necessitated the alienation of the subject. To Rousseau, the modern idea of human existence determined the democratic form of political existence. According to Mill, however, the prime political matter is achieving the greater good through public morality while still protecting individual liberty. The political issue is essentially a moral question of will formation. This is why, in *On Liberty*, he calls his topic "Civil, Social Liberty."⁵¹¹ Mill seeks to strike a balance between private and public interests in the midst of growing governmental power, widespread public organization of private interests, and the unfolding of public opinion. Mill downplays the importance of the political commitment and

prioritizes the moral one. As a result, he turns to the moral organization of the political community.

Mill's conception of social liberty redefines not only the political but also the existential public/private distinction. Civil anxiety arises not from an existential clash between rationality and non-rationality but from a tension between individual creativity and social conformity. According to Rousseau, existential publicness entailed the subject's sentimental relation with his worldly existence, projected in society. Mill reintroduces the idea of civil anxiety, but in quite a different way from Rousseau. Because Mill believes in a wide variety of human creative modes as an expression of freedom, he argues for an individual realm free from interference. Unlike Rousseau's (and Kant's) conception of individuality as a relation with existence, Mill's is a civil individuality, depicted as a private way of life and a source of creativity in the midst of growing social conformity. To Rousseau, freedom first and foremost was existential and non-rational, an essential condition of modernity as seen from a *pre-civilized* point of view. Mill's central question is how the individual can be given the privacy to realize himself as a creative and social being. Mill expects the consequence of individual liberty to be diversity of opinion, a situation that should increase the chance of moral progress. He is a convincing moralist, in the end, and thinks liberty is instrumental to morals.⁵¹² In *Considerations on Representative Government* Mill speaks unrestrained:

It is not sufficiently considered how little there is in most men's ordinary life to give any largeness either to their conceptions or to their sentiments. Their work is a routine; not a labor of love, but of self-interest in the most elementary form, the satisfaction of daily wants; ... in most cases, the individual has no access to any person of cultivation much superior to his own. Giving him something to do for the public supplies, in a measure, all these deficiencies. If circumstances allow the amount of public duty assigned him to be considerable, it makes him an educated man.⁵¹³

It is the publicity imperative that Mill formulates: man should be liberated from the drag of his private existence by improving his use of reason. He must get in contact with the public cause, with human culture, and taste the fruits of his Liberty.

8.5 Dewey: The instrumentalization of reason

Compared to John Dewey's understanding of the "problem of the public," Mill's moral concerns were only preludes to a further instrumentalization of the public use of reason. Dewey radicalizes Mill's reformulation of the moral private/public distinction by founding politics on the deliberative process of defining public interest. Like Mill, Dewey shows no political interest either in existential sentimentality or in the political commitment. Although Mill and Dewey both have a liberal aversion

to paternalism, they are convinced that it is politically necessary to morally educate the public—but without metaphysics. Dewey shows a similar fear about the private use of reason; he is as cynical about the asocial subject as was the later Mill.⁵¹⁴ As the lower social strata started to emancipate themselves—just as the third estate had done a century before—education became a crucial means to train public virtue.

But in contrast to Dewey, Mill feared that the public use of reason could very easily turn against individuals.⁵¹⁵ So, although he agreed on the importance of improving the “morality of public discussion,”⁵¹⁶ he was even more committed to securing plurality and creativity.⁵¹⁷ The existence of individual creativity was essential in order to update and refresh the process of public discussion, since the possibility of conformism always loomed. Dewey’s perspective is different from Mill’s, then, because Dewey is more focused on a characterization or definition for the concept of publicness. He makes the basic distinction “between private and public actions, that is, actions that have direct consequences, only affecting those who do the transaction, on the one hand, and indirect consequence, that is extending beyond the transacting people, on the other.”⁵¹⁸ While Mill was especially concerned with protecting individual creativity in the midst of growing public conformity, Dewey finds such caution only confusing, since there is no civil conflict to begin with. There is only obscurity and prejudice in human thought, a problem that publicity can solve.

Dewey is much less concerned than Mill with preserving a place for the individual in a growing social environment, simply because Dewey’s epistemology of will formation is intrinsically social. He locates the use of reason within a process of discussion and interaction, arguing that returning “to a condition of independence based on isolation” is impossible.⁵¹⁹ Solving the problem of the public requires a progressive deliberative strategy, which is to recognize the reality of social interdependencies: “The only solution [is] the perfecting of the means and ways of communication of meanings so that genuinely shared interest in the consequences of interdependent activities may inform desire and effort and thereby direct action.”⁵²⁰ To find a balance between private and public interests is a collective problem. The public needs to become conscious of *being a public*.⁵²¹

So, according to Dewey, there is no inherent opposition between the individual and the public, because individual actions have social consequences and, conversely, social occurrences influence individuals. Individual actions are not necessarily opposed to the public good, and well-intentioned social actions can have harmful effects.⁵²² Like Mill, Dewey’s standpoint is anti-essentialist; as a true pragmatist, he rejects a dualist stance to the world. He proclaims—not without some arrogance⁵²³—that his approach is an alternative *both* to the individualism of the liberal utilitarians *and* to the collectivism of neo-Hegelian idealists. Both philosophies are parochial and old-fashioned, caught up in deep metaphysical descriptions of social categories.⁵²⁴ Terms such as *society*, *individual*, or *state* are

all empty, it depends how they are operationalized and made object for public discussion: "In the concrete, there are societies, associations, groups of an immense number of kinds, having different ties and instituting different interests."⁵²⁵ We see here the great influence of Dewey on the philosophy of social constructivism: meaning can only be established by practical application made public.

The public/private distinction, in this respect, is no more than a conceptual tool to think about how to deal appropriately with the social construction of the world. Following Marx, Dewey interprets the public/private concept as a distinction between the technical, or empirical, and moral uses of reason, between constructing reality and publicly deliberating norms that legitimize that construct. The social sciences are to a great degree like the natural sciences, Dewey argues, since both disciplines deal with facts (behavioral facts, in the case of the social sciences). The problem, however, is the *interpretation* of such "social facts."⁵²⁶ Dewey holds that they should be judged according to their consequences, because individuals' thoughts and actions are social, namely, "the consequence of their behaviour upon that of others and that of others upon themselves."⁵²⁷ Complicating the issue, however, is that people value these consequential facts differently. The social construction of meaning is still private, according to Dewey, because it is influenced by unsophisticated interests and desires. Dewey says that people are often "not wholly informed by reasoned purpose and deliberate choice—*far from it*—but they are more or less amenable to them." That is why political philosophy needs to deal not just with the social facts, but with finding a normative consensus concerning their interpretation, which is "the question of *de jure*: the question of by what right, the question of legitimacy."⁵²⁸

How is such a normative consensus about the public interest to be understood? How can government legitimately intervene to establish public interest? Since Dewey rejects any a priori categorization—on the grounds of the social construction of reality and of value pluralism—he concentrates instead on the process of public deliberation. His criterion for understanding consensus and judging it is that the "perception of the consequences of a joint activity and of the distinctive share of each element in producing it [creates] a common interest..."⁵²⁹ Obviously, this perceiving of consequences is more easily said than done—which is why the process of deliberation requires some very capable members of the public, who feel both an awareness of the social artificiality of their perception and a responsibility to participate in the creation of a common interest. Getting the social construction of reality right is a big responsibility. As the saying goes, democracy is not for fearful people. Dewey laments, though, the problem of the public: its great inertia in the face of so much possibility. "What has happened to the Public in the century and a half since the theory of political democracy was urged with such assurance and hope?"⁵³⁰ The public is easily manipulated, "still largely inchoate and unorganized."⁵³¹ It is lagging behind technological progress

and needs to grow up quickly. The moral advance of society is disproportionate to its scientific progress. Just as it should take on the power to control and change the material environment, the public should morally empower itself in order to become a body of strong citizens that checks its government. The sheer magnitude of unintended and indirect consequences that arise with the coming of “the Great Society” makes it necessary for will-formation processes to become coordinated and public. It is important, therefore, to strive for publicity, so that people can come to understand the consequences of their actions and deeds: “There can be no public without full publicity in respect to all consequences which concern it. Whatever obstructs and restricts publicity, limits and distorts public opinion and checks and distorts thinking on social affairs.”⁵³² Democratic will formation must be public in both senses of the word: it must be open, and it must be owned by the populace. That is what democracy is about: a moral energy that should permeate the whole of society and organize the political community. “[Democracy] must affect all modes of association, the family, the school, industry, religion.”⁵³³ According to Dewey, democracy is a program of collective self-help: people need to open themselves up to it through discussion and sharing.

To Dewey, the problem of the public cuts both ways. Alongside being poorly educated and incapable of articulating itself well, the public has difficulties with representing itself politically. And since the state should not be seen as an impersonal, metaphysical entity in the first place, but as an organization made up by actual persons, the public should become conscious of its political power to hold officers of the state accountable. The political task of the public is both to articulate its interests by choosing the right candidates and to judge whether those elected to public office do in fact take good care of the public’s interests.

Dewey does not believe that what is good for the public is present in every subject, as Kant and Rousseau did (in their own ways). Dewey argues that, according to those authors, the social contract was an agreement between “single human beings and a collective impersonal will.”⁵³⁴ According to Dewey, such an idea of unconditional political commitment of the subject is not only completely abstract but potentially oppressive. It is not a legitimate justification for governmental action, which should be based instead on the “authority of recognized consequences to control behavior...”⁵³⁵ The authority of state action is legitimate only when it is based on publicly acknowledged goals, to which elected officials must remain loyal.⁵³⁶ In the end, the state is only the result of a well-organized public, just as “the public is a political state” itself.⁵³⁷

The political interpretation of the moral dynamic between the private and public use of reason increases the role of the government, which is permitted to legitimately intervene in the social habitats of the people. The way Dewey perceives governmental intervention is telling: what is considered “public” first should be *identified*, and then the authority of the state should be legitimated in

relation to the way it *deals* with these identified public interests. Therefore, “the line between private and public is to be drawn on the basis of the extent and scope of the consequences of acts which are so important as to need control, whether by inhibition or by promotion.”⁵³⁸ Put differently, the state comes into action as the representative of any part of the public that is “distinctive enough to require recognition and a name” and that is indirectly and seriously affected—for good or bad—by the actions of others.⁵³⁹ The public sphere is the platform where parts of the public apply for state recognition.

8.6 Conclusion

On the issue of popular sovereignty, scholars such as Althusius, Locke, Rousseau, and Kant all emphasize the great delicacy of maintaining the balance between the centrifugal force of popular will formation and the centripetal force of state authority. Although they offer varying definitions, these scholars agree that the public is supreme and gives the state its authority. The crucial issue, however, is not so much how to defend the idea of popular sovereignty as such—which, morally, is rather indestructible—but how this idea is politically organized. This is the question of politics as jurisdiction versus politics as will formation.

As I have argued in the former chapter, Rousseau most influentially analyzed the tension between civil freedom and public authority. Historically, his political theory can be placed right at the junction of both political paradigms. In the end, Rousseau thinks that only respecting a strict distinction between civil freedom and public authority can preserve the idea of popular sovereignty. With the introduction of political voluntarism, however, the role of the public itself in governmental rule became an issue. Public authority was based on the process of public will formation. While Rousseau formulated a notion of the general will, he refused to suggest that it be either the consequence of will formation or the instrument of governmental authority.⁵⁴⁰ The general will represented the political commitment and was not to be transformed into a process of will formation providing for state legitimacy. The legal connection between civil society and the general will was established by the legislator not by the citizen himself. Guided by the spirit of the general will, the lawgiver represented the people in accordance with the “simplicity of nature” and “the needs that society creates.”⁵⁴¹ To Rousseau, the executive—government—was an administrative intermediary, responsible for the execution of decrees in conformity with public law. The legislator was the pivotal political agent amid popular will and state authority. Kant was as aware as Rousseau of the danger of harmonizing state authority with the people’s will. He therefore formalized public law, believing that it would bring peace within the citizen (reasonable reconciliation). Due to the formality of the political commitment, the moral conflict could not be brought to the political level itself, for public law would be undermined from two sides, by both state interventionism and private will formation. Kant, however, unlike

Rousseau, did tie public law to the idea of moral self-legislation and the public use of reason. This move provided the theoretical groundwork to “activate” public law for scholarly generations to come, *by making the moral conflict between private and public reason politically instrumental*. And that is what happened. With the coming of the Great Society, the moral conflict was translated as a political dynamic between the impact of economy and technology, on the one hand, and moral deliberation by the public, on the other.⁵⁴² Just as the individual needed reason to control his or her private inclinations, the democratic state depended on public discussion to control and temper economic and technological development. Dewey: “[P]ositive freedom is not a state but an act which involves methods and instrumentalities for control of conditions.”⁵⁴³

It is possible to illustrate the political instrumentalization of public reason by examining the position of the public sphere. The forum/market distinction has become the compass of will formation, with the public sphere being the place where a capable public decides about its welfare. On the one hand, the formulation of public interest occurs in the public sphere, stimulated by a moral discourse, on the other, governmental intervention puts unseen pressure on the public sphere. Public deliberation is moral *and* political. The result is what I call the *double bind* of the public sphere: public discussion is expected to politically articulate popular sovereignty, while at the same time popular sovereignty is challenged by governmental intervention. A political understanding of the public sphere accords with the deliberative model of democracy, which supports a discursive and instrumental model of democratic will formation. The model is *discursive* because the political process is based on public deliberation; it is *instrumental* because the political purpose of public deliberation is concentrated on the realization of social justice and democratic legitimacy. Yet this way of understanding the democratic meaning of the public sphere does not hold. The public sphere is not a deliberative problem solver of political issues. Attempting to increase cultural integration, educate a capable public, control economic development, etc., by invoking public deliberation brings confusion to different aspects of democratic publicness. The public sphere has become smothered in incongruous aspirations and has imploded into a communicative vacuum: there is a lot of political talk, without actually empowering the self-reflective and self-organizing qualities of civil society itself. A first step to bring back the public sphere to the people is by distinguishing again between existential, moral and political publicness.

(Notes)

⁴⁸¹ Habermas, *Structural Transformation*, p. 112, italics JH.

⁴⁸² Kant, *Groundwork*, p. 93.

⁴⁸³ “It is obvious ... that the principle of happiness (which is not in fact a definite

principle at all) has ill effects in political right just as in morality, however good intentions of those who teach it." Kant, "Theory and Practice," p. 83. Cf. Kant, "Perpetual Peace," p. 122, in which Kant distinguishes between the political moralist and the moral politician. The first treats problems of right *technically*, that is, wants to create "the empirical conditions which permit the proposed end to be realised." The second sees problems *morally*, "totally different in its execution from technical problems, to bring about perpetual peace, which is desirable not just as a physical good, but also as a state of affairs which must arise out of recognising one's duty."

⁴⁸⁴ Kant, "Theory and Practice," p. 74.

⁴⁸⁵ Ibid., pp. 75-76.

⁴⁸⁶ Kant, "What is Enlightenment?," p. 45: "The natural impulses ... which cause so many evils, at the same time encourage man towards new exertions of his powers and thus towards further development of his natural capacities. They would thus seem to indicate the design of a wise creator—not, as it might seem, the hand of a malicious spirit who had meddled in the creator's glorious work or spoiled it out of envy." This shows that Rousseau and Kant both stress an inherent tension in worldly existence, yet diagnose it very differently. Rather than rationally transforming natural inequalities, Rousseau stresses a personal, almost stoic stance.

⁴⁸⁷ "[E]ach individual requires to be convinced by reason that the coercion which prevails is lawful. ... If there is nothing which commands immediate respect through reason, such as the basic rights of man, no influence can prevail upon man's arbitrary will and restrain his freedom. But if both benevolence and right speak out in loud tones, human nature will not prove too debased to listen to their voice with respect." Kant, "Theory and Practice," p. 86.

⁴⁸⁸ "The philosophers have only interpreted the world in different ways; the point, however, is to change it." *Theses on Feuerbach* (1845). Marx would not have dared to imagine that the world *would* have been changed by philosophers so rigorously exactly a century later.

⁴⁸⁹ R.J. van der Veen (1981) "Notes on the Marxian ideal of freedom," pp. 3-7. Henceforth: "Marxian ideal." Cf. Kant, "Perpetual Peace," p. 122.

⁴⁹⁰ Marx cited in: Van der Veen, "Marxian ideal," p. 14.

⁴⁹¹ See Van der Veen, "Marxian ideal," and Hupperts-Cluysenaar, *Wetenschapsleer voor juristen*, p. 96. Indeed, we also read some of the civil anxiety of Rousseau in Marx's words, yet their solution is very different—personal respectively political.

⁴⁹² See K. Jaspers ([1957], 1962) "Kant," pp. 97-135. See also Arendt, *Human Condition*, p. 235n75.

⁴⁹³ To be sure, this was not such a radical opinion as it may seem, since not only Hegel but also James Mill (see Sabine, *History of Political Theory*, p. 694) understood class interest to be the primary force behind public representation. And also see J.S. Mill, *On Liberty*, p. 10: "Where there is an ascendant class, a large portion of the morality of the country emanates from its class interests, and its feelings of class superiority."

⁴⁹⁴ Marx cited in: Van der Veen, "Marxian ideal," p. 13.

⁴⁹⁵ "Once society is established, poverty immediately takes the form of a wrong done to one class by another." G.W.F. Hegel ([1821], 2002) *Elements of the Philosophy of Right*, section 244, addition. Henceforth: *Philosophy of Right*. See also Habermas, *Structural Transformation*, pp. 117-122, and Sabine, *History of Political Theory*, p. 660. "Hegel's view of civil society ... did not share the illusion of the utilitarian economists that *laissez faire* is part of the unchangeable order of nature but suggested rather Marx's treatment of it as a phase of social development."

⁴⁹⁶ See also Habermas, *Structural Transformation*, pp. 85-88.

⁴⁹⁷ "The political revolution ... *abolished the political character of civil society.*" Ibid., italics KM. See again in a similar vein, ironically, Mill, *On Liberty*, p. 6: "A time however, came, in the progress of human affairs, when men ceased to think it a necessity of nature that their governors should be an independent power, opposed in interest to themselves. It appeared to them much better that the various magistrates of the State should be their tenants or delegates, revocable at their pleasure."

⁴⁹⁸ Marx cited in: Habermas, *Structural Transformation*, p. 123. Cf. Hegel, *Philosophy of Right*, section 260, addition.

⁴⁹⁹ "[I]f civil society forces its way into the *legislature en masse*, or even *in toto*, [and] the real civil society wishes to substitute itself for the fictitious civil society of the legislature, then all that is nothing but the striving of civil society to create a *political* existence for itself." Marx cited in: Habermas, *Structural Transformation*, p. 126, italics KM.

⁵⁰⁰ "The proletariat will use its political supremacy to wrest, by degree, all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state, i.e., of the proletariat organized as the ruling class; and to increase the total productive forces as rapidly as possible." K. Marx and F. Engels (1848) *Manifesto of the Communist Party*.

⁵⁰¹ Habermas, *Structural Transformation*, p. 129. A resemblance with Rousseau pops up: the political neutralization of civil anxiety would restore the personal sphere of the individual, now understood as shared intimacy.

⁵⁰² Again, not counting the socialist and fascist attempts of revolutions in Europe.

⁵⁰³ The growth of governmental intervention was only revisionist, from a Marxist perspective. It was a fake re-politicization of civil society because it pacified the proletariat and left the socioeconomic foundations of parliamentary democracies intact.

⁵⁰⁴ J.S. Mill ([1863], 1987) "Utilitarianism," p. 326, italics JSM. Cf. Mill, *On Liberty*, p. 83: "On questions of social morality ... the opinion of the public ... is likely to be still oftener right [than wrong]; because on such questions they are only required to judge their own interests; of the manner in which some mode of conduct, if allowed to be practiced, would affect themselves."

⁵⁰⁵ The notion of "duty" remained, however: "It is strictly a matter of duty; he is bound to give it according to his best and most conscientious opinion of the public good. Whoever has any other idea of it is unfit to have the suffrage; its effect on him is to pervert,

not to elevate his mind.” Mill, *Considerations*, Chapter X.

⁵⁰⁶ Mill, *On Liberty*, p. 16.

⁵⁰⁷ Mill’s measure to make up the balance between individual and social liberty is utility. The question, however, is how utility is ascertained—a question Mill has, arguably, never really answered. See on the principle of utility: *ibid.*, p. 14.

⁵⁰⁸ *Ibid.*, p. 5.

⁵⁰⁹ *Ibid.*, p. 7.

⁵¹⁰ *Ibid.*, p. 6.

⁵¹¹ “The subject of this Essay is ... Civil, Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual.” Mill, *On Liberty*, p. 5.

⁵¹² “Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter. They should be for ever stimulating each other to increased exercise of higher faculties, and increased direction of their feelings and aims towards wise instead of foolish, elevating instead of degrading, objects and contemplations.” Mill, *On Liberty*, p. 76.

⁵¹³ Mill, *Considerations*, Chapter III.

⁵¹⁴ “No man and no mind was ever emancipated merely by being left alone.” J. Dewey ([1927], 1954) *The Public and Its Problems*, p. 168. Henceforth: *Public*. Cf. Taylor, “Politics of Recognition,” p. 33-34.

⁵¹⁵ “The majority have not yet *learnt* to feel the power of the government their power, or its opinions their opinions. When they do so, individual liberty will be probably as much exposed to invasion from the government, as it already is from public opinion.” Mill, *On Liberty*, p. 12. Cf. A. de Tocqueville ([1835], 2006) *Democracy in America*, part II, Chapter 2: “The public has therefore among a democratic people a singular power, of which aristocratic nations could never so much as conceive an idea; for it does not persuade to certain opinions, but it enforces them, and infuses them into the faculties by a sort of enormous pressure of the minds of all upon the reason of each.”

⁵¹⁶ Mill, *On Liberty*, p. 55. “The right to the free expression of opinion was no longer called on to protect the public’s rational-critical debate against the reach of the police but to protect the nonconformists from the grip of the public itself.” Habermas, *Structural Transformation*, p. 134.

⁵¹⁷ Mill, *On Liberty*, p. 8.

⁵¹⁸ Dewey, *Public*, pp. 12-13.

⁵¹⁹ *Ibid.*, p. 155.

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*, p. 77.

⁵²² *Ibid.*, pp. 13-14. It is the sociological version of Wittgenstein’s private language argument.

⁵²³ “A score of intellectual ghosts [have risen] to obscure our vision.” *Ibid.*, p. 8.

⁵²⁴ Interestingly, we see today, regarding Dewey’s strategy of placing pragmatism

between liberal individualism and “social collectivism,” a familiar middle road characterization by deliberative democracy. See the Introduction, above.

⁵²⁵ Dewey, *Public*, p. 69.

⁵²⁶ *Ibid.*, pp. 4 ff.

⁵²⁷ *Ibid.*, p. 24. Cf. G.H. Mead ([1934], 1967) *Mind, Self, and Society: From the Standpoint of a Social Behaviorist*, p. 162: “A person is a personality because he belongs to a community.”

⁵²⁸ Both quotes Dewey, *Public*, p. 6, italics GD.

⁵²⁹ *Ibid.*, p. 188. But what is the difference between an agreement and a common interest? Here we see how the resentment towards metaphysics creates a vacuum of concreteness.

⁵³⁰ *Ibid.*, pp. 125-126.

⁵³¹ *Ibid.*, p. 109.

⁵³² *Ibid.*, p. 167.

⁵³³ *Ibid.*, p. 143.

⁵³⁴ *Ibid.*, pp. 18-19.

⁵³⁵ *Ibid.*, p. 19.

⁵³⁶ “There is no more an inherent sanctity in a church, trade-union, business corporation, or family institution than there is in the state.” *Ibid.*, p. 74.

⁵³⁷ *Ibid.*, p. 35.

⁵³⁸ *Ibid.*, p. 15.

⁵³⁹ *Ibid.*, p. 16, see also pp. 27, 35.

⁵⁴⁰ Rousseau, *Social Contract*, p. 101.

⁵⁴¹ *Ibid.*, pp. 95-96. “What makes the constitution of a state strong and durable is such a close observance of conventions that natural relations and laws come to be in harmony on all points, so that the law, shall we say, seems only to ensure, accompany and correct what is natural.” *Ibid.*, p. 98.

⁵⁴² It seems that the problem of the public is rearticulated each time technology booms. We saw Cass Sunstein introducing Dewey’s problem of the public in Chapter 1.

⁵⁴³ Dewey, *Public*, p. 168.

CONCLUSION

Someone romantic is said to be sensitive to life's unexpected turns. He knows that there is more than meets the eye. In our age it is not very hip to be romantic, though; better is a sense of assertiveness, the readiness to give an opinion, to self-assuredly work one's way into the future, and to give priority to a dynamic lifestyle.

Similarly, relating politics to romanticism is just not done. It would seem to hark back to the dark years of idealist politics in which the individual was sacrificed for the Greater Good. The tenor today is that politics is a serious business, in need of people who get things done. Politics cannot be in denial of life; it needs to step up to the plate, take on the challenges of an open society, and stay away from daydreaming.

Actually, I think it makes sense to aspire to be a political romantic. Since many things in life are difficult to predict, explain, and manage, politics without some magic and myth belittles reality. Politics encompasses a lot, but there is much that it cannot contend with. The language of politics speaks about real people and real things, yet is vastly abstract. Putting experiences in an understandable language, let alone sharing these descriptions with others, is already an art in itself. The virtue of understanding and communicating ideas and experiences is not so much a matter of rational argumentation, but more of symbolic illustration and narrative amplification. Reaching a *modus vivendi*, in this regard, is not a shameful compromise but an affirmation of the limitation of human rationality, the pluralism of human culture. There can be no true realism without some romanticism.

Politics as jurisdiction can be said to be the *conceptual implication* of the fundamental difficulty of political unification. It is a concept about how to legally structure the human aspiration to share. Politics as jurisdiction is the result of the intricacies of human cooperation and will formation, understood from the vantage point of a dualistic notion of democracy: it is both "civil" and "political" for the people themselves to constitute the polity.

Civil democracy is the art of the institutionalization of will formation processes. It denotes the organization and institutionalization of the complexity of human cooperation. This implies, first of all, keeping a balance between individual freedom and collective unity, through an understanding of the different types of knowledge that are the object of sharing. Secondly, it requires appreciating the values of human pluriformity and institutional plurality.

Political democracy is the state's authoritative organization of society in the name of society itself, and it follows the same balancing strategy between individual freedom and collective unity as civil democracy. The art of politics is to use authoritative means to structure civil processes of will formation in a way that most people can live with. Taking the idea of democracy seriously implies

respecting both its aspects equally—the desirability of civil self-sufficiency and the need for political authority.

In this thesis, I have criticized the idea of politics as will formation because it assimilates both aspects of democracy. Politics is usually seen as a system that deals with the formation of citizens' preferences and interests. Political theory, in this respect, has been narrowed down to the study of how to cope with the problem of preferential pluralism and diversity by focusing on the people's will—their capacity to use their reason publicly as a counterweight against the influence of private preferences, opinions, or beliefs. Liberalism, in particular the Kantian idea of morality and Constant's modernist interpretation of the classics, has been very influential in painting this picture. From the concept of the agora as the space of public will formation, where politics is made or broken, the concept of politics as will formation was born: the quest to publicly distill preferences in order to circumscribe "the political" in relation to a society of private individuals.

I have further argued that the deliberative strategy to open up liberal politics through a kind of rational cleansing of republicanism has proven unsuccessful—not so much because it still results in paternalistic politics, as a liberal would say, or because the deliberative approach leaves out important types of preferences (such as the personal or aesthetic), as a republican (or communitarian) would say, but because the deliberative approach is only a *redefinition* of a will formation approach to politics. Political legitimacy is still defined, according to deliberative democracy, as the result of a will-formation process in which the quality of preferences is the center of democratic legitimacy.

I have tried to show the inadequacy of this mode of political thinking. Politics understood as a process of forming the people's will not only reduces politics to a public (moral) discussion but gives public discussions themselves a political character as well. Political theory needs to widen its point of view by taken into account both levels of the polity, the level of will formation and the level of jurisdiction. The result is a different take on the idea of democracy.

Politics as jurisdiction is the development of the idea of popular sovereignty, and is understood as the practical organization of civil self-sufficiency in an environment of political authority. The question that politics as jurisdiction asks is how to balance civil autonomy and political authority. Political theory, in this respect, is a controlling science, or what I have epistemologically called a third-order construction: it studies the authoritative organization of democratically institutionalized knowledge. A political regime can be rightfully constituted and organized only if it is clear what knowledge is shareable, how, and to what degree. However, knowledge

of will-formation processes does not constitute the polity but, instead, enables ruling it and also puts into perspective the justification of the public authority's intervention in the institutional fabric of society. From a democratic standpoint, the political commitment of giving up authority to the state can be upheld only if the state preserves civil liberty well despite its own powers to intervene.

Democratic politics rests on the idea that a community freely hands over its private practices of will formation in allowing itself instead to be represented and protected by public authority. This model implies a disconnection between the civil and the political, because, in attaching their will-formation capabilities to political decision-making, the people jeopardize their civil autonomy. Because of this danger, public authority has a great responsibility to respect civil autonomy by representing the general will in practice. The model of civil democracy is essential to politics as jurisdiction, in this respect, as civil democracy understands the degrees of self-sufficiency embedded in practices (or institutions) of will formation. Political authority does not correspond with civil autonomy. The relation between society and state is in tension by definition. Strong state retribution may sometimes emerge, in order to uphold the civil order, but so may civil anarchy, in order to unshackle the state's fetters.

I have argued that three notions of publicness are essential to adequately conceive of the subject's relation to the democratic state. In building a political theory, we need to take into account the triple relation between the subject and what is outside the subject: the world (existence), society (humanity), and the state (authority). Although *in reality* every citizen is born within some sort of political union, his political identity, his condition of being under some authority, is artificial. Coming to terms with the idea of politically living together implies, therefore, giving equal notice to moral and existential publicness. Individuals cope with the world in their own ways. Their next step, so to speak, as self-interested human beings, is to relate with others who also have feelings, preferences, and opinions of their own. Although this moral notion of publicness is social, it is apolitical. It might lead to a desire to *institute* a society of people, but it cannot *constitute* it. An overlapping consensus of norms and values does not lead to political unity. We bond with others, yet the idea of living in a political society is fundamentally different, because it involves the acceptance of jurisdiction by a public authority, which can sometimes be unreasonable. The imagination of political democracy is ultimately the imagination of how, politically, to live with equal strangers under the protection of a public authority. This difficulty needs to be put into perspective by simultaneously bringing all three notions of publicness into the public debate about politics: the individual as a private, public, and political being. Balancing the polity requires taking all three identities seriously.

The concluding step is to illustrate politics as jurisdiction by giving an example.

This can only be a sketch, for in the end, the ambition of this book has been to make conceivable, from various philosophical perspectives, a different approach to political theory and politics. Working out the many details and intricacies of politics as jurisdiction is for the future. I finish here by outlining the approach that politics as jurisdiction provides towards a religious school.

What would be the deliberativist's take on a religious school? Any theoretical approach has to account for how such a school can be a legitimate part of a democratic state. The deliberative answer lies in finding out the compatibility between the religious reasons the school endorses and the moral reasons that are, or rather ought to be, the foundation of a democratic state. Rawls says that it is not enough that religious people accept a democratic government on the basis of merely strategic or prudential reasons. Likewise, Gutmann and Thompson claim that religious reasons can be accepted in a political discussion only if they are accessible to all. Such reason should be "recognizably moral in form and mutually acceptable in content."⁵⁴⁴ Rawls adds that the idea of public reason "is a view about the kind of reasons on which citizens are to rest their political cases in making political justifications to one another...."⁵⁴⁵ Hence, the possibility of religious prayer at public schools—an example given by Rawls himself—can be morally acceptable only if the religious message embedded within the prayers can be seen or expressed in terms of a political (or moral) reason.

To understand this deliberativist answer, recall the social-constructivist perspective attached to it. The deliberativist would argue that "reality" at the religious school is socially constructed, because religious values influence the private thoughts and actions of the students. He would call it politically imperative, consequently, to discuss publicly whether the practical influences of religious values in the school can be justified in a democratic society. The forum perspective comes in: "We" as a society need to discuss whether "we" want young children to grow up in a religious environment that shapes their preferences. In the end, religion is only acceptable if it is not obstructive to basic political values.⁵⁴⁶

Politics as jurisdiction's take on the issue of religion and education is different. In fact, the approach is precisely the other way around: the moral question about the rightness of religious prayer in a public school is seen as a civil matter, while the political question is only prudential or strategic. Allowing for religious prayer is not a matter of discussing whether the values expressed by the prayer can be said to be moral (and hence politically right), but whether religious prayer at schools is detrimental to the stability and unity of the polity.

It can be said that politics as jurisdiction is prudential for epistemological reasons.⁵⁴⁷ Judging the scope of political commonality means distinguishing types of knowledge and communication. In order to answer the question of how, politically, to deal with religion in education, it is pivotal to reconstruct the "communicative steps" taken before arriving at the question of political sharing. Speaking of

religious prayer as a “socially constructed reality,” and of the importance of publicly discussing prayer’s morality in order to establish its political validity, is easier said than done. A lot remains obscured, especially the inherent discrepancy between rationally describing religious practices (as social constructions) and the contextual situation of intuitive and informal interactions between teachers, children, school managers, etc. Without specifically distinguishing between different epistemological “realities,” an automatic call for public deliberation to check the moral status of religious prayer does grave injustice to the situation of religious schools and their civil status in general. Given the distinctions between the orders of construction (non-rational, informal, rational), public discussions about religious school practices should be assayed with much care.

For that reason political jurisdiction cannot do without a theory of democratic will formation, that is, how individuals construct knowledge, form culture, institutionalize certain values etc., etc. Civil democracy in this respect—the missing “fourth model” of democratic will formation I distinguished from Jon Elster’s schema—is the idea of society as a complex of relatively self-sufficient practices of will formation (such as schools), in which people acquire intrinsic knowledge about certain life functionalities (such as education). We may assume that in these practices, people try to realize a certain quality of action, although, naturally, in reality many things will go wrong. Knowledge of this normative framework of civil democracy is essential to the other aspect of politics as jurisdiction: the juridical or authoritative regulation of civil institutions and practices. Political decisions need in the end to be authoritative, and it is precisely for that reason that a good grasp of the institutionalization of civil practices of will formation is so important. Again, practically giving away sovereignty to state authority is legitimate only if state authority is executed in line with respect for civil self-sufficiency. Why else would the demos put its faith in public authority?

The purpose of a religious school is to educate the children in line with its idea of education. This is a democratic freedom, and attached to it are civil responsibilities, which can be the object of public discussion, to be sure. For instance, it may be expected that the school takes into account the way the children cope with the school practice. Epistemologically speaking, much functioning of the school happens at a first-order—informal—level of communication, interaction in which non-rational knowledge is mixed with rational knowledge. The school is a practice in which subjects interact within an actual and changing context, while having implicit understandings of the habits and rules seen from the working ground. Often these processes work well—or at least *seem* to. Potential conflicts are usually resolved informally, or stay below the surface. Such informal interaction and communication is essential for practices to function. Making things explicit all the time would only result in irritation, friction, or even stagnation. First-order constructions would be *artificially rationalized* if they were continuously reconsidered as second-order

constructions, and an increase of conflict is likely. Indeed, often elements from first-order constructions are very difficult to discuss, due to their contextual and intuitive quality. Conversely, however, continuous pressure to reconstruct second-order constructions by appeal to insights of first-order interaction and communication would undermine the stabilizing function of second-order constructions. It is thus important to preserve qualities of both first and second-order constructions, because participants in a practice need both orders of construction: the freedom to interact informally, and a clear set of rules as mechanisms for benchmarking and indicating first order constructions. In sum, these epistemological insights support the values of both institutional plurality and human uniformity. A social institution is often much better equipped to deal with the formation of preferences and capabilities of individuals in a weak than in a strong political context of unification.

Now, say a meeting is called between the teaching staff and school board at such a school. How could a discussion within the school be characterized? I would call it a *public discussion in a private environment*. Daily interactions and experiences in the school are discussed and related to how things are regulated. The intention of the teaching staff is to bring out the best conception of the school practice, which may result in the suggestion to adjust certain rules. The school board, however, would be inclined to bring first-order practices more in line with school rules. This governing body feels a responsibility to keep the system of rules intact, not only because it wants to realize certain goals stated there (such as graduating the children, teaching them religious values, keeping up discipline), but also because it is focused on preserving its authority as such. At the same time, however, the board needs to respect and understand the discussion about the relation between first-order practices and school rules. The quality of education, after all, is embedded in the first-order practices of the school. Such a public discussion is an important asset in the school's institutionalization process. It can be said that the school board, teaching staff, and students seek a common *appreciation and understanding* of the quality of the school practice and of how it should be organized. By rationalizing the contextual knowledge of first-order practices, perhaps in relation to second-order rules, a body of knowledge is constructed that gives the school a certain identity and direction. Such collective knowledge lies mostly beyond the empirical, and has a more metaphysical or symbolic status: based on intrinsic knowledge of the school practice, it gives a sense of school direction and identity to all members. The public discussion within the school about things like student-teacher relations or the balance between theory and practice in classes has a regulatory function, yet in a loose or conceptual sense. The discussion is interpreted differently by individual school members, while the nature of the insights forbids a purely behaviorist execution by way of an induced rule.

The religious school's internal discussion becomes more public if the school, for instance, sets up a project with a secular school in the neighborhood. Say that the

purpose of this joint venture is to let school pupils exchange thoughts about certain life questions (birth, death, health, sickness) and to relate them to certain concrete issues (play, sports, books, TV shows). Perhaps, as a result of this project, both schools will make modifications in their programs and lessons due to reciprocal insights. What would be the status of that result? I would call such an exchange *public between two private practices in the civil sphere*.

The next phase in civil communication could be called a *public discussion at a civil level*—the “classical” public-sphere discussion. Someone on the school board could be invited to a discussion that is open to the public with other educational representatives, for instance, about the relation between religion and education. A diversity of institutional knowledge about the religious school itself would meet comparable institutionalized knowledge of other schools, but perhaps also of other agencies in the educational field, like civil servants, parents, religious leaders, or economic developers for that matter. The public discussion in this civil setting has a new object, therefore—to relate all the different bodies of knowledge concerning the issue at hand with the issue of how to organize education in society.

The important difference between a public discussion between two private practices in the civil sphere, and a public discussion in the civil sphere as such, is that the latter discussion needs to *abstract* from the specific contexts of the schools and other institutions in question. Although the body of public-sphere knowledge refers as much to the schools themselves (and other agencies) as to society in general, the main purpose of the knowledge generated is to have a general understanding of the social value of education (in relation to religion). Of course, the particular interests of the parties involved will be voiced in the discussion, yet they cannot be brought into the discussion *as* mere interests, but as ways of doing, as the practices of a certain culture. A public-sphere discussion can be said to be a narrative in which the parties explain their traditions and conventions in relation to a greater civil value. The result is a plural picture of educational narratives, to be sure. The specific value of a public-sphere discussion is that, despite the plurality of educational narratives (based on different institutional experiences), an educational commonality develops, and it develops precisely because the discussion is not a competition between interests as such. It may be expected that the participants of the discussion ought to respect this plurality, since that is what living in democracy is about. Yet the creation of a common mind concerning education is important as well, for virtuous reasons such as solidarity, empathy, understanding, and tolerance.

Indeed, this sort of public discussion is where deliberative democracy invests much value, and, to be sure, that is a good thing—leaving aside the crucial issues of both the discussion’s political status and its epistemological status. To begin with the latter caveat, it is important not to confuse the epistemological status of public-sphere discussions with their moral value. The three discussions’ increasing degree

of publicness—within the religious school, between the two schools, and between the religious school and other stakeholders—does not run parallel to an increase in their moral status. A discussion within the religious school itself concerning the role of religion in education is not morally inferior to a public-sphere discussion about that same topic, as if a lesser quality of knowledge were reached in the former discussion. Without substantial knowledge about human action in a certain institutional setting, no general discussion is possible in the first place. On the other hand, such knowledge is valuable only if it is related to public-sphere discussions that create a social body of knowledge about institutional plurality. Public-sphere stakeholders must find a common vocabulary to discuss institutional plurality, one that is analogous to the symbolic knowledge that institutes a religious school. Although the point of view is different, there is no *principal* difference between private and public justice. The discussions are epistemologically different, not worse or better. In contrast to the depiction of deliberative democrats, then, deliberative democracy holds that public-sphere discussions should not be seen as moral competitions right from the start—although they may end there. The market/forum distinction between “private conceptions of the good” versus “public conceptions of justice” gives the discussion a misconceived purpose and the discursive (public) component of the discussion a misplaced superior status. Understanding the civil status of education requires gaining private knowledge, in one way or another, about the contextual ins and outs of educational institutions. The liberal distinction between private and public preferences, which is still fundamental in the deliberativist’s vocabulary, instrumentalizes private preferences by transforming their contextuality and materiality into public reasons. Only after this process of laundering can private preferences, according to deliberative democracy, attain a moral status and become part of political rule-making. The result is a distortion of both public and political reasoning.

Public discussions in the civil sphere are politically important because they classify insights about institutional realities concerning all sorts of processes of will formation. From the perspective of the political public/private distinction, such discussions *remain* private, however. This is the jurisdictional approach’s second difference from deliberative democracy. Public-sphere discussions are directed to the way *society itself* wants to define and organize education by classifying institutional realities—relating concrete insights of the practice to general ideas about a practice in a civil context—and vice versa, relating general ideas to practical insights. Although the art of giving *jurisdiction* to society is dependent on such dual knowledge, *political discussions in public spheres* about education and religion are different. The object of these discussions is the role of public authority—the way it governs, that is, facilitates and intervenes in the institutional structures of educational practices. This inquiry is not only a public discussion about how citizens experience governmental action in their civil lives, but also a very specialized discussion

regarding the intricate question of legally structuring the institutional web. Here the political commitment of the citizen meets the very responsibility of state officials to explain jurisdiction. This overlap implies that both (representatives of) civil practices and the state need to discuss how to legally structure the institutional framework of society so that practices can develop themselves the way they would like.⁵⁴⁸

However, the state, meaning not just the government, has an independent authority to put all the different dynamics of civil society—those between individuals and institutions as well as those between institutions themselves—into law. It needs to pacify power relations within civil society without destroying the institutional environment through which civil practices organize life. The political commitment of the citizen is directed, then, to the acceptance of state authority, whose trust is based on the understanding that political authority is not the continuation of the moral discussion concerning the institutional organization of civil practices. Instead, the citizen is a subject of the law and must understand that law is necessary to uphold the *political* unity of society. Regarding the civil system of education, the idea of political unity represented by law entails the political unification of the educational system not in a moral way, but in a political way. The political discussion concerning education is not about how children ought to be educated but how to provide the legal conditions for an institutional framework that allows schools to educate children. This implies the preservation of political unity—the provision of national examinations, a basic curriculum, etc.—but not the political integration of moral prescriptions—singing the national anthem, teaching lessons on public behavior (for instance, about smoking, sex, use of the Internet)—for that would politicize the educational system. The moral education of children is a civil activity, and, keeping in mind the epistemology of acquiring and sharing knowledge, an intricate interplay of ethical and moral interactions.

The double-bind position of the public sphere symbolizes the precarious relation between state and society. Discussions in the public sphere are caught between the definition of general knowledge concerning particular civil domains, and the value of these insights for political jurisdiction. To balance the explicit authority of the state to give jurisdiction implies respecting public-sphere discussions, because that is where the ideal of civil self-sufficiency is formulated. The state is certainly a speaking partner in these discussions, yet it must limit itself to the meaning and the limits of its jurisdiction.

In April of 2008, a Dutch parliamentary investigation committee examined three major 1990s reform operations in the secondary school system. The main conclusion of the “Dijsselbloem committee” was that a series of government administrations unfortunately mixed up political with civil goals. On the one hand, schools were expected to realize certain moral ideals of educational will formation, embodied,

for instance, by the introduction of a uniform curriculum for the first three years of secondary school (called “basisvorming”). Ideas about didactics and education were made part of a political mission. Moreover, due to purposes of democratic legitimation, the execution of these different reforms was done by a state-sponsored semipolitical stratum of educational experts and professional process managers. The idea was that this layer could be the democratic bridge between the political and the civil sphere.

The Dijsselbloem committee concluded that the political execution of civil norms as a form of jurisdiction was precisely the problem, for it mixed responsibilities. The responsibility for good education was given to a layer of semi-political professionals who were mandated by the government to execute the reform. The result was a discussion between schools and these professionals about the practical matters of education. Particularly, a discussion arose concerning the method of education. Basically, a moral conception of how children were best taught to form their preferences, wills, and opinions was the motor behind these political operations. The responsibility of government to give jurisdiction to the educational field—allowing it, on the one hand, to legally structure the power relation between educational agents and, on the other, to prescribe simple collective goals for education and a way to test these goals—was neglected. The commission stressed that the civil aspect, the matter of *how* children are to be educated, is a responsibility of schools themselves. In this respect, parents are free to choose the school system they prefer for their child.

Ironically, the *fear* of a democratic deficit in education—namely, of an increase in the number of unsuccessful students—turned into a *real* democratic deficit. The mandate given to the semi-political bureaucratic stratum—to bridge politics and civil society by means of an ongoing deliberation between the bureaucratic stratum (as a representative of government) and the schools—interfered with the qualities of both civil agencies and the state: to increase the quality of will formation on the one hand and of jurisdiction on the other.

(Notes)

⁵⁴⁴ Gutmann and Thomson, *Democracy and Disagreement*, p. 57.

⁵⁴⁵ Rawls, “Idea of Public Reason Revisited,” p. 165.

⁵⁴⁶ *Ibid.*, p. 166.

⁵⁴⁷ This epistemological perspective is wider than the one taken by Gaus when he states that a robust epistemological theory of justification is necessary for a political conception of justice. See Gaus, *Justificatory Liberalism*, pp. 4 ff. I think Gaus is right to put epistemology at the center of political theory, but it should be seen from a wider, Aristotelean, perspective, I think. Epistemology is important in political theory because knowledge of political ruling implies knowledge of human functioning. This implies a notion of the possibility of sharing different types of knowledge.

⁵⁴⁸ Alongside the political discussion in the public realm, there are the public discussions within governmental agencies themselves concerning the role of public authority in relation to civil practices of will formation. These discussions could be called private discussions in the political realm. Obviously, this is another place where considerable study needs to be done in order to understand how the different governmental agencies relate to each other concerning the task of giving jurisdiction to different parts of society. Discussions in parliament, finally, have a special character, and might be called public discussions in the political realm. Legislators have a special status because they operate at the brink of society and state. On the one hand, as the people's representatives, they are part of public-sphere discussions in the civil realm, and on the other, they have a special responsibility to connect these discussions to the task of jurisdiction. Parliamentarians need to be strong people, in other words, capable of explaining the difference between political jurisdiction and civil will formation.

NEDERLANDSE SAMENVATTING

Sinds de jaren negentig vinden veel politieke denkers dat deliberatieve democratie de tegenstelling tussen het liberalisme en het republikanisme met succes heeft aangevallen.⁵⁴⁹ De deliberatieve wending (*deliberative turn*⁵⁵⁰) in de politieke theorie wordt gezien als een doorbraak in een oude impasse, namelijk tussen het primaat van legaliteit, verdedigd door het liberalisme, en het primaat van volkssoevereiniteit, benadrukt door het republikanisme.⁵⁵¹ Deliberatieven streven naar een integratie van liberale en republikeinse elementen door hun beider goede elementen te behouden (liberale rechtvaardigheid en republikeins burgerschap) en hun zwakke elementen (liberaal paternalisme en republikeins perfectionisme) te verwerpen. Zij zien democratische politiek als het streven naar rechtvaardigheid, maar wel in een redelijke, onpartijdige discussie.⁵⁵²

Deliberatieven gaan uit van democratie als zelfwetgeving, ze zien het politieke systeem als een associatie die wordt bestuurd door haar leden, het volk.⁵⁵³ Politieke besluiten dienen democratisch gelegitimeerd te worden, hetgeen betekent dat zij voorafgegaan dienen te zijn door zoveel mogelijk publieke discussie.⁵⁵⁴ Deliberatieve democraten zijn doorgaans kritisch over de huidige staat van het publieke debat. Private belangen en de waan van de dag domineren veel discussies, terwijl politiek juist over reflectie en emancipatie van burgerlijke oordeelsvorming zou moeten gaan. Het ideaal is een politieke gemeenschap van burgers die in staat zijn hun private belangen en meningen in een publiek verband te brengen.⁵⁵⁵

Centraal in het normatieve ideaal van deliberatieve democratie staat het onderscheid tussen politiek en marktconform handelen: de eerste vindt plaats na publieke discussie en opinievorming, de laatste met het oog op een efficiënte aggregatie van private belangen.⁵⁵⁶ Publieke discussie is evenwel de kern van democratie en wanneer mensen het niet eens zijn met elkaar en er niet uit komen, dan rest er maar een ding: om de tafel zitten en met elkaar praten. Zoals Paul Scheffer het stelt: “Zonder een wij gaat het helemaal niet, zonder een kritische betrokkenheid vergruist de samenleving.”⁵⁵⁷ De boodschap is duidelijk: we leven in een open samenleving en zijn gesteld op diversiteit en een verscheidenheid aan levensstijlen, maar dit ideaal kan niet zonder collectieve zelfreflectie. Omdat er geen “wij” meer bestaat,⁵⁵⁸ moet de uitdaging van een pluralistische cultuur gecompenseerd worden door kritische en publiekelijk zelfonderzoek een vooraanstaande plek in de samenleving te geven.⁵⁵⁹

Op het eerste gezicht is de deliberatieve intuïtie een vanzelfsprekende, immers, wat is er tegen discussie in een democratie? Een ieder die zijn hart heeft verpand aan de algemene zaak kan moeilijk de waarde van publiek debat ontkennen. Waarom zou je de stelling betwisten, dat democratie niet zonder actief burgerschap kan en dat morele conflicten slechts in dialoog opgelost kunnen worden?

Sterker nog, als democratische burgers mogen we van elkaar *verlangen* dat we onze politieke meningen toetsen aan publieke maatstaven. Politiek egoïsme is een democratische doodzonde.

Toch wringt er iets. Moet de kloof tussen politiek en burger geslecht worden en staat of valt democratische legitimiteit met actief burgerschap? Is publieke discussie de *essentie* van democratie? Als ik zelf nadenk over wat ik waardeer aan een democratie, is dat dan mijn betrokkenheid bij het publieke debat of juist dat ik dat zelf kan bepalen. Wil ik zoveel mogelijk politieke invloed uitoefenen of geef ik mijn mandaat liever aan politici die mijn soevereiniteit adequaat representeren en zorgen dat ik in vrijheid mijn private leven kan leiden door verantwoord om te gaan met hun macht?

Het komt de lezer wellicht wat geforceerd of kunstmatig over om de keuze op deze wijze voor te stellen—maar toch is het nodig naar mijn idee. De suggestie kleur te bekennen refereert aan een netelige dubbele kwestie in onze tijd: de politisering van het publieke debat en de popularisering van politiek. Dagelijkse politiek lijkt steeds meer op een media spektakel, terwijl publieke discussies automatisch een politieke connotatie dreigen mee te krijgen. Het politieke debat is een moreel meningencircuit, terwijl publieke zaken al snel met overheidsactie worden verbonden. Mijns inziens zijn beide fenomenen het gevolg van de deliberatieve benadering die erop gestoeld is het “democratische tekort” aan te pakken.

Het democratische tekort impliceert enerzijds, dat burgers minder goed in staat zijn (of steeds onwilliger worden) hun ideeën kritisch onder ogen te zien, en anderzijds dat politici teveel in een ivoren toren leven en moeite hebben zich te identificeren met het publiek. Deliberatieve democraten menen dat een hoogstaander publieke debat beide kwalen kan indammen. Burgers zullen hun oordeelsvermogen vergroten door te discussiëren en politici zullen meer verantwoording moeten afleggen.

Ik meen dat de tijd gekomen is vraagtekens te plaatsen bij het vertrouwen in publieke discussie als remedie voor democratische legitimiteit. Ik stel voor om niet te streven naar een verdere *integratie* van publieke discussie en politiek, maar om een scherpere *scheiding* te trekken tussen beide. Aan de ene kant is het belangrijk meer vertrouwen te krijgen in de manier waarop burgers functioneren in hun maatschappelijke omgeving en hoe dat bijdraagt aan een democratische manier van leven. Aan de andere kant moet het politieke aspect van democratie benadrukt worden, namelijk hoe de publieke macht op een gezaghebbende manier de maatschappij bestuurt.

Politiek handelen is een expertise, en hoewel er van uit gegaan kan worden dat wat onderwerp van een publieke discussie wordt, belangrijk is, is de politieke vertaalslag daarvan niet eenvoudig. Hoewel ik grote waarde hecht aan mijn gezondheid en daar ook genoeg over te zeggen heb, wil ik uiteindelijk de arts kunnen vertrouwen te bepalen wat juist is. Ik doe mijn best mijn gezondheid te bewaren,

maar uiteindelijk heb ik geen zicht op het grotere geheel. Daarom: ik draag graag mijn steentje bij aan het publieke debat over wat belangrijk is in de samenleving, maar ik weet dat het politieke perspectief complex is en niet altijd vanzelf duidelijk wordt in een publieke discussie. Politiek denken heeft een breed perspectief en gaat over het vormgeven van een samenleving. Politiek organiseert op een wettelijke wijze de institutionele omgeving van maatschappelijke praktijken waarin individuen het leven vormgeven. Wordt er publiekelijk gediscussieerd over de boekenprijzen, over de Islam, over het fileprobleem of over de kwaliteit van het onderwijs, dan gaat de politieke discussie erover hoe de overheid de wettelijke voorwaarden schept dat burgers zelf de kwaliteit van een maatschappelijke praktijk verbeteren. Voor politieke vertegenwoordigers (in brede zin) geldt hetzelfde: zij doen mee aan het publieke debat en hebben ongetwijfeld een mening klaar over een onderwerp, uiteindelijk dwingt de politieke functie die zij bekleden hen het morele gezichtspunt los te laten en na te denken over de politieke inrichting van de samenleving. Politieke discussies zijn niet eenvoudigweg publieke discussies over wat goed is, en morele discussies zijn niet automatisch politieke discussies over dingen die door de staat geregeld moeten worden.

Dit boek onderzoekt de deliberatieve intuïtie en bekijkt haar historische wortels. Het is een legitieme vraag of de rechtvaardiging van het politieke systeem zo direct verbonden moet zijn met het publiekelijk bediscussiëren van opinies en preferenties. Mijn stelling is dat de deliberatieve opvatting van politiek niet geboren is in de jaren zeventig, en doorontwikkeld in de jaren negentig van de vorige eeuw, maar symptoom is van een langere ontwikkeling in de politieke theorie. Deliberatieve democratie is onderdeel van een politiek paradigma dat ik *politiek als wilsvorming* noem. Volgens dit paradigma draait politiek om de kwestie *hoe* er om moet worden gegaan met opinies en preferenties van mensen (hun “wil”).⁵⁶⁰ De conceptie van politiek als wilsvorming is ontstaan in de Verlichting en gebaseerd op een communicatieve dynamiek tussen private (strategisch) en publieke (redelijke) preferenties. In het tijdperk van de Verlichting kwam de idee van subjectieve autonomie opzetten; de “wij-vraag” werd geïntroduceerd in de politiek, namelijk hoe de samenleving door het volk zelf kon worden bestuurd. Belangrijke denkers in die tijd meenden dat het antwoord lag in de bereidheid en capaciteit van de individuele burger om zijn of haar motieven te toetsen aan het algemene belang van de maatschappij. Het was de verwachting dat vanuit het publieke gebruik van de rede van de burger een politieke collectiviteit zou voortkomen.⁵⁶¹ De centrale vraag, volgens politiek als wilsvorming, is hoe de wil van de burger politieke legitiem kan worden.

Ik stel een alternatieve conceptie van politiek voor en noem haar *politiek als jurisdictie*. Deze opvatting van politiek is niet gebaseerd op het publiek/privé-onderscheid tussen egoïstische en altruïstische preferenties, maar tussen politieke autoriteit (‘staat’) en civiele autonomie (‘maatschappij’). Politiek als jurisdictie

legt geen direct verband tussen legitimiteit van politieke autoriteit en maatschappelijke processen van wilsvorming (waaronder verstaan kan worden meningsvorming, kennisverwerving, waarheidsvinding, deliberatie, etc.), maar maakt juist een principieel onderscheid tussen hen. Politiek als jurisdictie houdt zich bezig met het zoeken naar de juiste balans tussen enerzijds het belang van een autonome maatschappij en anderzijds de noodzaak van een publieke interventiemacht. Politiek is niet het resultaat van, maar de voorwaarde voor processen van wilsvorming; haar legitimiteit ligt niet in de kwaliteit van preferenties maar in de kwaliteit van het representatieve kader van de publieke autoriteit, waarmee processen van wilsvorming in een politieke eenheid worden geplaatst.

Politiek als jurisdictie doet de lezer wellicht denken aan het bekende onderscheid tussen private concepties van het goede en publieke concepties van rechtvaardigheid, maar niets is minder waar. Het onderscheid tussen staat en maatschappij, tussen civiele autonomie en publieke autoriteit, is niet gebaseerd op waarden en meningen en loopt niet parallel aan het onderscheid tussen morele en niet-morele preferenties. Het ideaal van politiek als jurisdictie is niet de publieke rede waarop een constitutie gebaseerd dient te zijn, maar een complexer idee van politieke eenheid. De politieke kwestie is niet hoe een onderscheid te maken tussen publieke, redelijke, en private, onredelijke, waarden, maar hoe een balans te vinden tussen de uitvoerende macht van de publieke autoriteit aan de ene kant en het begrip van de maatschappelijke processen van wilsvorming, aan de andere kant. De politiek dient verstand te hebben van ziekenhuizen en wat daar gebeurt, maar alleen om een dergelijke institutie een zodanig wettelijke identiteit te verlenen dat het zelf optimaal kan functioneren. Politiek moet macht en verantwoordelijkheden van belanghebbenden in die medische wereld in recht vertalen, zodat het medische werk zo goed mogelijk verloopt. Politieke kennis is juist zo lastig omdat het zowel vraagt om een concreet inzicht in wat mensen beweegt, een politiek gevoel, als een abstract verstand om te bepalen hoe de maatschappij bestuurd moet worden, een juridische geest.

De opzet van het boek is als volgt. In deel 1 analyseer ik de onvolkomenheden van politiek als wilsvorming en de voorkeur voor politiek als jurisdictie vanuit verschillende perspectieven: historisch, analytisch en epistemologisch. In deel 2 continueer ik mijn argument maar doe dat door een—noodzakelijkerwijs—beknopte politiek-theoretische geschiedenis van het publiek/privé-onderscheid. Het is mijn bedoeling om de verschillende wortels van beide politieke paradigma's bloot te leggen en uiteindelijk verschillende concepten en ideeën te introduceren die als bouwstenen van politiek als jurisdictie kunnen dienen. Ik heb bewust gekozen voor dit brede perspectief om de historische inbedding van politiek als jurisdictie te laten zien. Dat betekent dat nog veel onderzoek naar de actuele betekenis van politiek als jurisdictie gedaan moet worden, als ook naar haar afzonderlijke theoretische elementen. Dit is voor de toekomst.

In hoofdstuk 1 onderzoek ik het morele idee achter politiek als wilsvorming: de *publicity imperative*. Hieronder versta ik de verwachting dat mensen hun particuliere opvattingen dienen te verbeteren door ze kritisch en publiekelijk te bespreken. Ik stel dat deze imperatief tot het opzoeken van publiciteit een goed perspectief op politieke problemen hindert. Ik illustreer dat aan de hand van drie kwesties: het debat over de democratische belofte van het Internet, Richard Rorty's ironische kritiek op het liberalisme, en tenslotte de relatie tussen vrijheid van religie en vrijheid van meningsuiting. Ik beweer dat in al deze debatten het politieke probleem als een probleem van wilsvorming wordt gezien. Mijn conclusie is dat politiek, opgevat als morele strijd tussen private en publieke preferenties, een te beperkte opvatting is. Een meer gelaagde opvatting van politiek is wenselijk, hetgeen een frisse studie naar de conceptuele kwaliteiten van het publiek/privé-onderscheid noodzakelijk maakt.

Hoofdstuk 2 is een pleidooi voor de merites van het publiek/privé-onderscheid in de politieke theorie. Het onderscheid kan dienen om bepaalde ideeën in de politieke theorie te illustreren—zoals de *publicity imperative*. Anders gezegd, politiek theoretiseren wordt onvermijdelijk beïnvloed door bepaalde metafysische impressies van de wereld, die vervolgens geëxpliciteerd kunnen worden aan de hand van het publiek/privé-onderscheid. Het onderscheid vormt dus een conceptuele brug tussen intuïtie en theorie. Ik onderzoek het verband tussen metafysica en theorie, en de rol van het publiek/privé-onderscheid hierin, in een bespreking van Raymond Geuss' *Public Goods, Private Goods* (2001). Tegengesteld aan zijn eigen verwerping van metafysica beweer ik dat Geuss' boek heel mooi laat zien hoe een politieke benadering beïnvloed is door metafysica; het werk biedt de lezer een kijkje achter de schermen van een politieke filosoof en laat zien hoe zijn wereldbeschouwing zijn theorie doordringt.

Hoofdstuk 3 is een analytische kritiek op politiek als wilsvorming en een introductie van politiek als jurisdictie. Aan de basis van politiek als jurisdictie ligt het eerder genoemde publiek/privé-onderscheid tussen “maatschappij” en “staat”. Om deze bewering te onderbouwen analyseer ik Jon Elster's klassieke verdediging van deliberatieve democratie. Elster beschouwt politieke theorie aan de hand van twee karakteristieken: ten eerste het politieke proces, dat gedefinieerd kan worden als *privaat* of *publiek*, en ten tweede het doel van politieke theorie, dat gedefinieerd kan worden als *instrumenteel* of *intrinsiek*. Het resultaat van deze analyse leidt tot drie modellen van politieke theorie (of democratie): liberaal, deliberatief en republikeins. Alleen de laatste twee zijn uiteindelijk het onderzoeken waard volgens Elster, omdat zij het politieke proces als publiek kenschetsen. Het liberale model ziet politiek als *privaat*. Elster pleit voor een *forum approach* van politiek, omdat de essentie van politiek ligt in de publieke discussie of deliberatie van preferenties. Ik stel de vraag waarom Elster niet het vierde model noemt, namelijk, politieke theorie als *privaat* proces met een *intrinsiek* doel. Ik stel dat Elster dit model heeft

genegeerd, of over het hoofd heeft gezien, door zijn benadering van politiek, namelijk als wilsvorming. Mijn suggestie een alternatieve benadering van politiek, als jurisdictie, serieus te nemen maakt het vierde model van wilsvorming wél plausibel. Ik noem het “civiele democratie” om het private karakter hiervan te benadrukken. Politiek als jurisdictie in dit opzicht is het *publieke* aspect van democratie en houdt zich bezig met het vinden van een balans tussen de publieke interventiemacht van de staat en de bescherming en facilitering van de institutionele autonomie van civiele processen van wilsvorming. Politiek als jurisdictie is het *praktische gevolg van de idee van volksoevereiniteit*: om vrij te zijn, geeft de burger zijn soevereiniteit aan een publieke autoriteit, die met dat mandaat burgerlijke vrijheid dient te waarborgen. Hiermee gaat een publieke vervreemding gepaard die onvermijdelijk is, aangezien civiele wilsvorming en politieke jurisdictie niet tot elkaar te herleiden zijn. De publieke discussie over politieke legitimiteit (of de democratische legitimiteit van de staat) gaat over hoe de staat om moet gaan met de institutionele vrijheid van civiele praktijken van wilsvorming.

Hoofdstuk 4, het laatste hoofdstuk van het eerste deel van het boek, is een epistemologische analyse van politieke theorie. Ik neem drie stellingen over politieke theorie die geregeld terugkomen in de literatuur onder de loep. Deze stellingen hebben een pragmatische grondslag gemeen. Volgens de eerste stelling is politieke theorie *praktisch* en niet metafysisch, omdat zij probleemoplossend dient te zijn. Volgens de tweede stelling is politieke theorie *sociaal-constructivistisch*, omdat zij, zoals alle theorie, de werkelijkheid construeert. De laatste stelling benadrukt dat politieke theorie *intersubjectief* is, omdat haar conclusies gerechtvaardigd dienen te worden ten opzichte van degene voor wie ze bedoeld zijn: het publiek. Ik bekritiseer deze stellingen in het licht van wat ik beschouw als een cruciale epistemologische kwestie, het “kenprobleem”. Het kenprobleem is het essentiële verschil tussen de ervaring en de beschrijving van de werkelijkheid, en leidt tot een classificatie van drie orders van sociale constructie: niet-talig (nulde orde), informeel (eerste orde) en rationeel (tweede orde). Het pragmatisme maakt geen principieel onderscheid tussen de orders van constructie, en heeft daarmee een grote invloed op de moderne politieke theorie uitgeoefend. Pragmatische epistemologie draait om informele kennis, kennis die tijdelijk gebruikt wordt om zo goed mogelijk in een bepaalde situatie te functioneren: rationele kennis geeft in dit opzicht slechts een technische richting aan informele betekenisgeving, terwijl niet-rationele kennis volgens het pragmatisme betekenisloos is zolang deze niet vertaald is. In hoofdstuk 3 stelde ik dat deliberatieve democratie een inadequate democratietheorie oplevert omdat het politiek als een *publiek process van rationele wilsvorming* ziet. In hoofdstuk 4 laat ik zien dat hierachter een pragmatische epistemologie schuilgaat. Deliberatieve democratie begrijpt menselijke wilsvorming als een sociale constructie en ziet politieke theorie in dit opzicht als een normatieve theorie die menselijke wilsvorming in een kader van publieke en redelijke deliberatie plaatst. Ik claim echter dat, naast

informele kennisverwerving, de andere aspecten—rationeel en non-rationeel—van kennisverwerving even belangrijk zijn voor een politieke theorie. Daarom pleit ik voor politieke theorie als een derde orde constructie: ze reconstrueert tweede orde rationalisaties (instituties, regels, protocols) van eerste en nulde orde kennis, met het doel deze processen een wettelijk kader te geven. Politieke theorie kan dus niet slechts probleemoplossend zijn (praktisch), maar is ook metafysisch, omdat ze niet-talige kennis een plek moet geven. Politieke theorie, tenslotte, kan wel als “intersubjectief” geduid worden, maar niet op een redelijk, maar op een symbolisch niveau—als representatie van bepaalde tweede orde rationaliteiten.

In hoofdstukken 5 en 6 ontwikkel ik het idee van civiele democratie als model van democratische wilsvorming. Ik doe dat door Griekse concepties van publiek en privé te bestuderen. Mijn indirecte ambitie is een opvatting van de Griekse—eigenlijk Atheense—politieke traditie te geven die uitgebalanceerder is dan, wat ik noem, de modernistische versie, die sterk door het liberalisme is beïnvloed is. Ik beweerde in hoofdstuk 1 dat een liberale conceptie van democratie de moderne ontwikkeling van politiek geweld aandoet, omdat deze ontwikkeling gedomineerd wordt door het imperatief publiciteit op te zoeken. Aan de andere kant van moderne vrijheid ligt een scepsis jegens private preferenties. Ik stel dat de Griekse politieke theorie als liberaler dan de moderne traditie kan worden gekarakteriseerd, juist omdat de *politieke* scheiding tussen publiek en privé scherper werd getrokken. Wilsvorming en jurisdictie zijn in de moderne opvatting van politiek nauwer verbonden met elkaar dan in de Griekse politieke traditie. Het kan daarom een modernistische dwaling genoemd worden om Griekse politieke theorie republikeins of deliberatief te interpreteren.

In hoofdstuk 6 concentreer ik op Plato's en Aristoteles' ideeën van “publiek” en “privé”. Plato ziet het publiek/privé-onderscheid als een onderscheid tussen politiek en kennis dat hij op twee manieren ontwikkelt: ten eerste als een epistemische relatie tussen individuele en politieke ethiek, en ten tweede als de persoonlijke strijd om rechtvaardigheid binnen het publieke kader van recht. Aristoteles verdiept het dubbele Platoonse publiek/privé onderscheid door de vraag te stellen welke kennis wij eigenlijk kunnen delen, en vervolgens, hoe wij kennis politiek moeten organiseren. Met betrekking tot epistemisch delen onderscheidt Aristoteles drie soorten van *rationele* kennis (theoretisch, praktisch en technisch) en met betrekking tot het politiek organiseren van kennis onderscheidt hij twee concepties van wat ik noem “civiele autarkie”: institutionele pluraliteit en menselijke pluriformiteit. Volgens Aristoteles is het doel van politiek het vinden van een gemiddelde dat als leidraad dient voor menselijk functioneren—dit impliceert een grens aan de zucht naar politieke eenwording. Aristoteles benadrukt de tweeledige taak van politiek als jurisdictie, namelijk als kennis van de epistemologische status van processen van wilsvorming, en anderzijds, als kennis van de taak van politieke organisatie. Politieke theorie is een overkoepelende theorie, zegt Aristoteles; het bestudeert de gezaghebbende organisatie van democratisch geïnstitutionaliseerde kennis.

In hoofdstuk 7 introduceer ik drie moderne concepties van het publiek/privé-onderscheid. De idee van moderne democratie kan uitgelegd worden aan de hand van drie subjectieve noties van openbaarheid. Ten eerste de existentiële, welke draait om de relatie tussen het subject en zijn of haar bestaan (de wereld). Ten tweede, de morele sensatie, welke draait om de relatie tussen het subject en zijn medemens (de maatschappij). Ten derde is er de politieke sensatie van openbaarheid en deze bepaalt de relatie tussen het subject en autoriteit (de staat).

Een vergelijking tussen Rousseau and Kant brengt twee verschillende benaderingen van deze drie noties van openbaarheid in perspectief. Ik laat zien dat Rousseau de principiële verschillen tussen de drie aspecten van moderne openbaarheid benadrukt, terwijl Kant bezig is hun onderlinge verwantschap te vinden. Morele openbaarheid is volgens Kant de verbindende factor tussen existentiële en politieke openbaarheid. Het publieke gebruik van de menselijke rede, de kern van morele openbaarheid, geeft zin aan het bestaan en is tevens de essentie van democratische politiek. Kant's politieke theorie leidt tot de klassieke apologie van politiek als (morele) wilsvorming. Door zijn rede publiekelijk te gebruiken, zegt Kant, komt de mens in contact met zijn soortgenoten, en is hij in staat na te denken over de politieke constitutie van de maatschappij. Rousseau's politieke theorie lijkt wel op die van Kant, maar verschilt uiteindelijk wezenlijk. Rousseau vreest dat de morele dynamiek van de rede beide andere noties van openbaarheid bedreigt. Menselijke vervreemding (existentieel en politiek) is onvermijdelijk. Vanuit politiek opzicht moet de legitimiteit van de politieke constitutie, en daarmee van de publieke autoriteit, niet afhankelijk gemaakt worden van morele wilsvorming. Rousseau verwierpt het Kantiaanse primaat van morele openbaarheid en ijvert voor een gelijkwaardige positie van de drie moderne noties van openbaarheid.

In hoofdstuk 8 leg ik uit hoe Rousseau's vrees is bewaarheid. Door een analyse van de politieke opvattingen van Marx, Mill, en Dewey, laat ik zien hoe de dominantie van het morele publiek/privé-onderscheid geleid heeft tot een publieke discours waarin existentiële en politieke openbaarheid verdwenen zijn. Het politieke subject wordt gekarakteriseerd door zijn morele status: zijn capaciteit om zijn private preferenties publiekelijk te transformeren is de bron van democratische legitimiteit geworden. De integratieve functie van morele wilsvorming heeft geleid tot een *double bind* van de publieke sfeer. De publieke sfeer wordt gezien als een deliberatieve ruimte waar zowel moraal als politieke legitimiteit wordt gevormd. Het ongelukkige effect is een politisering van publieke discussies en een moralisering van politieke discussies.

In de conclusie keer ik terug naar de theoretische kernpunten van dit onderzoek. Ik illustreer ze door de relatie tussen politiek als jurisdictie en een civiele praktijk tot voorbeeld te nemen, namelijk een religieuze school.

(Noten)

⁵⁴⁹ Sommige fragmenten uit deze introductie hebben als basis: G. Drosterij (2007) "Mind the Gap: Three Models of Democracy, One Missing; Two Political Paradigms, One Dwindling."

⁵⁵⁰ J. Dryzek (2000) *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, p. v; cf. B. Ackerman and J.S. Fishkin (2003) "Deliberation Day."

⁵⁵¹ "[Deliberative democracy] invests the democratic process with normative connotations which are stronger than those found in the liberal model but weaker than those found in the republican model." J. Habermas ([1996], 2001) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, p. 298. Verder: *Facts and Norms*.

⁵⁵² "The struggle to make something public is a struggle for justice." Benhabib, "Models of Public Space," p. 83. Zie ook W. Kymlicka (2002) *Contemporary Political Philosophy*, tweede editie, p. 153.

⁵⁵³ E.g. J.L. Cohen (1988) "Discourse Ethics and Civil Society," pp. 12-24. J. Cohen (1997) "Deliberation and Democratic Legitimacy," p. 67; A. Gutmann and D. Thompson (1996) *Democracy and Disagreement*, p. 12.

⁵⁵⁴ "The definitive idea for deliberative democracy is the idea of deliberation itself." J. Rawls ([1997], 2001) "The Idea of Public Reason Revisited," p. 138.

⁵⁵⁵ Zie bv. B. Barber (1985) *Strong Democracy: Participatory Politics for a New Age*, p. 151. "Public citizens must be restored to their proper place as masters of their private choices." B. Barber (2007) "Overselling Capitalism." Cf. C. Sunstein (2001) *Republic.com*, p. 169.

⁵⁵⁶ "[T]he private relates to public as childish stands to the adult." Barber geciteerd in: T. Jollimore (2007) "Hey, kids! Madison Avenue wants you!" See also e.g. J. Bohman and W. Rehg (1997) "Introduction," p. xiv. "The deliberative process forces citizens to justify their decisions and opinions by appealing to common interests or by arguing in terms of reasons that 'all could accept' in public debate." J. Bohman geciteerd in: T. Witschge (2004) "Online deliberation: Possibilities of the Internet for deliberative democracy," p. 111.

⁵⁵⁷ P. Scheffer (2007) *Het land van aankomst*, p. 405.

⁵⁵⁸ Id.

⁵⁵⁹ Zie bv. Gutmann and Thompson, *Democracy and Disagreement*, p. 1.

⁵⁶⁰ Cf. I. Shapiro (2003) *The State of Democratic Theory*, pp. 1-9, en p. 146.

⁵⁶¹ Cf. J. Rawls ([1993], 1996) *Political Liberalism*, pp. 7-9.

DISSERTATION SUMMARY

Many political scholars argue that the opposition between liberalism and republicanism has been successfully challenged by deliberative democracy. Deliberativists aim to rejuvenate the idea of democracy as popular self-government, maintaining that political decisions should be (as much as possible) the result of public deliberation. In my dissertation I critically examine the deliberative intuition. I argue that it is a symptom of a political paradigm, which originated in the Enlightenment. I call it *politics as will formation*. According to this paradigm, politics evolves around the issue of how to deal in a democratic way with people's preferences. Politics as will formation is based on a moral private/public distinction between strategic and reasonable preferences. I propose an alternative conception, which I call *politics as jurisdiction*. This conception is based on the public/private distinction between state authority and civil autonomy. Politics as jurisdiction does not relate the legitimacy of the political system to the moral quality of public discussion—it strictly distinguishes between them.

In Chapter 1, I explore the moral idea behind politics as will formation, called the “publicity imperative.” I argue that it hampers an adequate perspective on political issues, and I introduce three topics to exemplify this: the debate about the democratic potential of the Internet, Richard Rorty's ironist critique on liberalism, and the relation between freedom of religion and freedom of speech. I argue that in all these debates the political problem at hand is viewed as an issue of political will formation. My conclusion is that a moral perspective is too narrow for an adequate political theory. A more complex conception of politics is called for.

In Chapter 2, I explain how using the public/private distinction may clarify some basic ideas that inform political theory—for instance, the publicity imperative. It could be generally said that political theory is affected by metaphysical impressions of the world, which should be made explicit during analysis. The public/private distinction is a conceptual bridge between intuition and theory, in this respect, and I develop this thought by reviewing Raymond Geuss's *Public Goods, Private Goods* (2001).

In Chapter 3, I analyze Jon Elster's classic defense of deliberative democracy. Elster distinguishes three political theories (liberal, deliberative, republican) in light of two sets of characteristics: the political process (*private* or *public*) and political purpose (*instrumental* or *intrinsic*). I ask why Elster did not analyze the fourth model, in which the political process is private and the political purpose intrinsic. I explain the omission by referring to Elster's underlying paradigm of politics as will formation. Politics as jurisdiction strongly improves the plausibility of the missing fourth model of will formation (called “civil democracy”), as it strictly distinguishes

between the political and civil aspect of democracy. Politics understood as “jurisdiction” is concerned with finding the balance between the implementation of public authority and the preservation of the institutional autonomy of civil practices of will formation.

In Chapter 4 I scrutinize three postulates of political theory that often recur in contemporary literature and are heavily influenced by pragmatism. I critically analyze them in the light of a key epistemological issue: the “epistemic problem.” This leads to a classification of three orders of the social construction of knowledge: non-linguistic, tacit and rational. I argue that pragmatist epistemology does not strictly distinguish between these orders of construction, a lack that has influenced contemporary political theory a great deal. Pragmatism is based on acquiring tacit knowledge, from which perspective rational knowledge merely gives technical guidance, while non-linguistic knowledge has no meaning until put in words. I argue that all orders of construction are, in their own right, imperative for any political theory. I finish the chapter by revisiting the three postulates of political theory.

In Chapters 5 and 6, I develop the model of “civil democracy” by examining the public and private in Greek political theory. In Chapter 5 I present an account of the Greek political tradition that is more balanced than a modernist account, which is heavily influenced by liberalism. I argue that Greek political theory can be characterized as *more* liberal than the modern tradition, and that it is a modernist misunderstanding to depict Greek political theory so republically.

In Chapter 6, I concentrate on Plato’s and Aristotle’s conceptions of “public” and “private.” Plato elaborates the distinction twofold: as a relation between individual and political ethics, on the one hand, and as the pursuit of truth within a framework of law, on the other. Aristotle expands this double Platonic private/public distinction by asking what knowledge we can actually share, and how we can manage that knowledge. Both issues need to be tackled by distinguishing between three types of rational knowledge (technical, practical and theoretical) and two values of civil self sufficiency (institutional plurality and human pluriformity).

In Chapter 7, I explain the idea of modern democracy as comprising three subjective senses of publicness: existential, which concerns the relation between the subject and existence; moral, which concerns the subject’s relation with others; and thirdly, political, which concerns the relation between the subject and political authority. A comparison between Rousseau and Kant brings into perspective their different approaches to these distinctions. I argue that Rousseau does the best job explaining the differences between the three aspects of modern publicness, while Kant is focused on moral publicness, which he sees as the core of modern politics. Kant’s theory is the classic apology of politics as will formation, while Rousseau rescues politics as jurisdiction by claiming that all three senses of publicness have equal democratic stature.

In Chapter 8, I explain, by the writings of Marx, Mill, and Dewey, how Rousseau's fears have become real; that is, how the Kantian domination of the moral public/private distinction has given birth to a political discourse in which both existential and political publicness have disappeared. This has led to what I call the double bind of the public sphere: the public sphere is seen as a place where both moral preferences are constructed and political legitimacy is created. The erroneous effect is a political understanding of public discussions and a moral understanding of political discussions.

In the Conclusion, I return to the main theoretical aspects of the study, and put them into perspective by sketching the relation between politics as jurisdiction and a particular civil practice, using a religious school as an example.

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